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In The Supreme Court of the United States

OCTOBER TERM, 1962

No. ~~[illegible]~~ 78

STANDARD CIGAR COMPANY,
a Florida corporation,

Petitioner,

vs.

TABACALERA SEVERIANO JORGE, S.A.,
a Cuban corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In The Supreme Court of the United States

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NO.

STANDARD CIGAR COMPANY,
a Florida corporation,

Petitioner,

vs.

TABACALERA SEVERIANO JORGE, S.A.,
a Cuban corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, Standard Cigar Company, a corporation organized and existing under the laws of the State of Florida, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, dated and entered October 17, 1962, reversing a final judgment of the United States District Court for the Southern District of Florida, Tampa Division, which dismissed, on the ground of *forum non conveniens*, the complaint and action of the respondent, Tabacalera Severiano Jorge, S.A., a corporation organized and existing under the laws of the Republic of Cuba.

OPINIONS BELOW

The opinion and final judgment of the district court (R. 53-55) has not been reported but is printed in App. A, p. 1, *infra*. The opinion of the court of appeals (R. 61), presently is unreported, but will be reported in _____F.2d_____. A copy thereof is printed in App. B, p. 6, *infra*. The opinion of the court of appeals in a companion case decided on the same day as this suit, to-wit, *Pedro Menendez Rodriguez v. Pan-American Life Insurance Company* and *Maria Cristina Vento Jaime v. Pan-American Life Insurance Company*, No. 19130, presently is unreported, but will be reported in _____ F.2d_____. A copy thereof is printed in App. B, pp. 8-25, *infra*.

JURISDICTION

The judgment of the court of appeals was dated and entered on October 17, 1962 (R. 63). A timely petition for rehearing filed by petitioner was denied by an order dated and entered on December 20, 1962 (R. 82). The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

The following questions are presented in connection with the intervention by the Cuban Government, in Cuba in September 1960, of the respondent, a Cuban corporation whose prinicipal place of business was in Havana, Cuba, and all of whose stockholders, directors and officers were Cuban citizens, and particularly in connection with a suit instituted in the district court, in October 1960, without authority from the Cuban Government, in the name of the respondent, by Cuban na-

tionals who were stockholders, directors, officers or agents of the respondent at the time of the intervention, to collect from the petitioner a debt incurred in Cuba prior to the intervention and due and payable in Cuba after the intervention, which suit was dismissed, on the ground of *forum non conveniens*, by a final judgment of the district court, and which judgment was reversed by the court of appeals:

1. Where, before the filing of this suit, the sovereign government of the Republic of Cuba, within its own territory, had intervened and taken control of the respondent, did the court of appeals err in declaring that our courts are not compelled by the Act of State doctrine to give full force and effect to the decrees of the Castro Government in Cuba, and in requiring the district court to determine whether the intervention decrees of the Cuban Government are confiscatory or otherwise violative of fundamental concepts of justice and, therefore, without status in the respondent's suit against the petitioner?

2. Did the court of appeals err in deciding that consistently, repeatedly and concurrently the State Department has expressed its conclusion that our courts are not restrained from adjudicating the effect of the intervention decrees of the Castro Government in Cuba?

3. Did the court of appeals err in requiring the district court, which sits in Florida, to determine whether the Republic of Cuba (through its interventor or otherwise) is or those Cuban nationals who filed or caused the filing of this action in the name of the respondent are entitled to manage the internal affairs of the respondent, a Cuban corporation, and to collect in the name of the respondent the debt due by the petitioner?

4. May the court of appeals reverse the judgment of the district court without determining that, in applying the doctrine of *forum non conveniens,* the district court exceeded its powers or the bounds of its judicial discretion?

5. Did the court of appeals err in applying to this suit the established judicial policy applicable in the field of maritime law in cases involving foreign suitors, plaintiffs and defendants, that where controversies are *communis juris*—that is, which arise under the common law of nations—jurisdiction should be taken unless to do so would work an injustice?

6. Did the court of appeals err in holding that, to be entitled to a dismissal of the respondent's suit on the ground of *forum non conveniens*, the petitioner was required to show that the respondent could obtain justice in the courts of Cuba?

STATUTES AND DECREES INVOLVED

The statutes and decrees involved are the following laws and decrees enacted and promulgated by the Republic of Cuba, to-wit, Resolution No. 20260, of September 15, 1960, Decree No. 1384, of April 9, 1951 and Law No. 568, of September 29, 1959.

The pertinent text of Resolution No. 20260 is set forth in App. D, pp. 29-34, *infra*. The pertinent text from Decree No. 1384 is set forth in App. D, pp. 35-38, *infra*. The pertinent text from Law No. 568 is set forth in App. D, p. 39, *infra*.

STATEMENT OF THE CASE

On October 26, 1960, the respondent, Tabacalera Severiano Jorge, S.A., a Cuban corporation having its principal place of business in Havana, Cuba, filed its complaint in the district court against the petitioner, Standard Cigar Company, a Florida corporation having its principal place of business in Tampa, Florida, seeking to recover the sum of $100,894.28 for tobacco sold and delivered by the respondent to the petitioner between July 1, 1960 and July 25, 1960 (R. 2-3).

Jurisdiction of the district court was invoked under the provisions of 28 U.S.C. § 1332, in that the respondent is a Cuban corporation and petitioner is a Florida corporation.

The petitioner moved the district court to dismiss respondent's complaint on the ground of *forum non conveniens*, or, in the alternative, to abstain from exercising jurisdiction (R. 3-43). The affidavit of the president of petitioner was attached to said motion (R. 8-43). After hearing arguments of counsel for the respective parties, the district court reserved ruling upon said motion and ordered petitioner to answer the respondent's complaint (R. 44).

The petitioner answered asserting, among other things, that the court should abstain from exercising jurisdiction and that the suit in the name of the respondent corporation could not be maintained because it was not instigated by the Republic of Cuba, or its agents (R. 44-51).

The petitioner's motion to dismiss or to abstain from exercising jurisdiction, affidavit in support thereof and answer showed and show the following facts, issues and contentions to be involved in this suit:

1. Since January 7, 1959, the government of the United States of America has recognized and now rec-

ognizes the Provisional Government of the Republic of Cuba, the same being the government of which Fidel Castro is Premier, and the severing by the United States of diplomatic and consular relations with the Cuban Government on January 5, 1961, did not constitute a cessation of recognition of such government (R. 47-49).

2. Between July 1 and July 25, 1960, respondent sold and delivered in Havana to petitioner leaf tobacco of the value of $100,894.28. In accordance with established custom and agreements between respondent and petitioner the purchase price of each shipment of tobacco was due and payable in Havana 90 to 120 days after shipment (R. 9, 10).

3. After the sale and purchase of the said tobacco in July, 1960, but before the purchase price thereof became due and payable by the petitioner to the respondent, on or about September 15, 1960, the Revolutionary Government of the Republic of Cuba, by Resolution No. 20260, of its Ministry of Labor, intervened and took control of the entire Cuban tobacco industry, including the respondent corporation (R. 10,15-25; App. D, pp. 29-34, *infra*).

4 The purpose of said intervention of the Cuban tobacco industry was to increase production, to increase employment, to improve the quality of tobacco products, to guarantee the supply of tobacco to customary markets, to take over businesses which had been abandoned leaving numerous debts and to normalize the situation in the tobacco industry, insuring the stability of workers and their jobs and the production of tobacco and tobacco products in general (R.20-25; App. D, pp. 29-34, *infra*).

5. The Cuban Government appointed an interventor to manage the affairs of respondent, and, continuously from his appointment, the interventor has been and is in charge and control of respondent, and, upon the ap-

pointment of the interventor, the stockholders, directors, and officers of the respondent at the time of intervention were removed from charge and control of respondent, its assets and the management of its affairs (R. 10).

6. After the intervention of respondent, the petitioner received, in the name of the respondent, a demand for payment in Cuba by said interventor and a separate demand for payment in Miami, Florida, from Cuban nationals who were former stockholders, directors, officers, attorneys-in-fact or agents of respondent at the time it was intervened (R. 11, 12, 25-27, 38-40). The demand of the interventor stated that no person or entity was authorized to effect collection of the said indebtedness in the name of the respondent corporation in the United States (R. 11,12,38-40). The said Cuban nationals knew that the interventor claimed the balance due respondent, but nevertheless urged the petitioner to pay the sums due to respondent in Miami (R. 12, 43).

7. On October 26, 1960, said Cuban citizens filed or caused the filing of this action in the name of respondent against petitioner. The suit was instituted and is being maintained without the authority of the Cuban Government or its interventor (R. 2-12,13).

8. A basic issue in this suit is whether the Republic of Cuba (through its interventor or otherwise) is or those Cuban nationals who instigated this suit in the name of respondent are entitled to control and manage the affairs of the respondent and to collect the sum sued for herein in the name of respondent (R. 3-8, 44-48).

9. The respondent's claim accrued in Cuba and not within the jurisdiction of the district court.

10. All of the transactions, occurrences and matters involved in this suit took place in the Republic of Cuba, and the issues involved in this action are governed and controlled solely by laws, decrees, resolutions and proclamations of the Republic of Cuba, which the district court should not undertake to construe, interpret and apply in this cause.

11. Any final judgment entered in this suit would not be *res judicata* in a suit against the defendant in the Republic of Cuba, or elsewhere, in the name of the respondent corporation instigated by the Cuban Government or its interventor to collect the said indebtedness (R. 3, 6, 7, 44, 47).

12. Any final judgment entered in this suit in favor of the respondent, if collected, would leave the petitioner exposed to having to pay said indebtedness again in a suit instituted in Cuba, or elsewhere, in the name of the respondent corporation instigated by the Cuban Government or its interventor (R. 3, 7).

13. The docket of the district court is crowded, the issues involved in this suit are not local in nature, but are foreign to the district court and the citizens of the district who would be called upon to serve as jurors, and, in the interest of justice, the district court should not undertake to exercise jurisdiction in this suit (R. 3,7).

14. In the interest of justice and for the convenience of parties and witnesses, the district court should abstain from exercising jurisdiction in this suit (R. 44,47).

The district court, after considering the pleadings, the affidavit in support of motion to dismiss and oral arguments of counsel for the respective parties, on May 22, 1961, entered its final judgment dismissing the re-

spondent's complaint and action on the ground of *forum non conveniens*, without prejudice, however, to the right of the respondent to institute an action on its claim in *any other appropriate court* (R. 53-55).

In its final judgment the district court made the following findings (R. 53-54):

A. "The plaintiff, Tabacalera Severiano Jorge, S.A., is a corporation organized under the laws of the Republic of Cuba.

B. "The defendant, Standard Cigar Company, is a corporation organized and existing under the laws of the State of Florida, and having its principal place of business in Tampa, Florida.

C. "All of the transactions, occurrences and matters involved in this suit took place in the Republic of Cuba, and the issues involved in this action are governed and controlled by the laws, decrees, declarations and proclamations of the Republic of Cuba.

D. "The plaintiff's claim did not accrue within the jurisdiction of this Court.

E. "The docket of this court is crowded, and to permit this suit to be prosecuted would burden this court unnecessarily with difficult and complicated litigation.

F. "For the convenience of parties and witnesses and in the interest of justice, the plaintiff's claim best could be litigated and disposed of in the Republic of Cuba.

G. "For the reasons hereinbefore stated, among others, this action should be dismissed on the ground of *forum non conveniens*."

The respondent appealed from said final judgment (R. 55-58).

On October 17, 1962, the court of appeals reversed the district court for the reasons stated in its opinion in *Pedro Menendez Rodriguez v. Pan-American Life Insurance Company* and *Maria Cristina Vento Jaime v. Pan-American Life Insurance Company*, No. 19130, decided on the same date and remanded the cause for further proceedings not inconsistent with its opinion therein (R. 61-62; App. B, pp. 6-7, 8-25, *infra*). The petitioner timely filed a petition for rehearing (R.65-81) which was denied on December 20, 1962 (R. 82-83; App. C, pp. 26,27-28).

In its opinion in Case No. 19130, *Pedro Menendez Rodriguez v. Pan-American Life Insurance Company* and *Maria Cristina Vento Jaime v. Pan-American Life Insurance Company*, the court said that this suit is companionable with Case No. 19130, that their component parts are identical in many respects and that the ultimate determination of the two appeals rests upon the same foundation (App. B, p. 9, *infra*).

With respect to the doctrine of *forum non conveniens*, the court of appeals, in its opinion in Case No. 19130, stated that the district court's application of the doctrine to the respondent's suit was not an abuse of discretion by the district court in the application of a traditionally equitable doctrine, but was an erroneous application of law to the established facts (App. B, p. 14, *infra*). The court of appeals then proceeded to state the law which it felt the district court should have applied.

After recognizing the settled rule that at least two forums must be open to a plaintiff in which the defendant is amenable to process before the doctrine of *forum non conveniens* comes into play, the court of appeals then stated that the district court should have applied the rule announced in *The Belgenland*, 114 U.S. 355, 367 (1885) and *Motor Distributors, Ltd. v. Olaf Pedersen's Rederi A/S*, 239 F.2d 463, 465 (5th Cir. 1956) (App. B, p. 15, *infra*). The rule announced in the last cited cases is the established judicial policy applicable in the field of maritime law in cases involving foreign suitors, plaintiffs and defendants, that where controversies are *communis juris*—that is, which arise under the common law of nations instead of under the law of a single nation—jurisdiction should be taken unless to do so would work an injustice.

Further, the court of appeals stated that, to be entitled to a dismissal on the ground of *forum non conveniens*, the petitioner must show that the respondent, a Cuban corporation, could obtain justice in the courts of Cuba (App. B, pp. 15-16, *infra*). This burden was imposed in addition to the requirement of showing that there was another forum open to the respondent in which the petitioner was amenable to process.

The court of appeals then discussed the applicability to the respondent's suit of the Act of State doctrine, which was described as a second and more crucial issue raised on the petitioner's motion to dismiss the respondent's complaint (App. B, pp. 18-25, *infra*). The court of appeals defined the Act of State doctrine as a rule of conflict of laws which holds that American courts will not look into or pass upon the validity of the acts of foreign governments performed in their capacities as sovereigns within their own territories (App. B, p. 19, *infra*).

The court of appeals announced that the executive branch of our government, through the State Department, had expressed its conclusion that our courts are not restrained from adjudicating the effect of intervention decrees of the Castro Government in Cuba. The court of appeals cited the case of *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845 (2d Cir. 1962), as being dispositive of the issue concerning the applicability of the Act of State doctrine to the respondent's suit (App. B, pp. 20-24, *infra*). The court of appeals then declared that our courts are not compelled by the Act of State doctrine to give full force and effect to the decrees of the Castro Government in Cuba, and required the district court to determine whether the intervention decrees of the Cuban government are confiscatory or otherwise violative of fundamental concepts of justice and, therefore, without status in the respondent's suit against the petitioner (App. B, pp. 23-24, *infra*). The court of appeals stated that it matters not whether the thrust of the Cuban intervention decrees be directed against Cuban nationals or American citizens (App. B, p. 24, *infra*).

In its aforesaid opinion, the court of appeals noted that in the record before it there was no expression of any kind from the State Department and that none had been requested and that it did not perceive any necessity for formal comment by the State Department about this case (App. B, pp. 24-25, *infra*).

The court of appeals reversed the judgment of the district court dismissing the respondent's complaint and remanded the cause for further proceedings not inconsistent with the opinion of the court of appeals in Case No. 19130 (R. 98-99; App. B, pp. 6-7,8-25, *infra*).

REASONS RELIED ON FOR ALLOWANCE OF WRIT

1. That part of the decision of the court of appeals sought to be reviewed which relates to the Act of State doctrine is in conflict with a number of decisions of this Court and of other courts of appeals on the same matter.

In Florida at the present time there reside more than one hundred thousand Cuban citizens. Many of these persons own or owned real property and tangible and intangible personal property situated in Cuba. Some of this property has been expropriated by laws and decrees of the Cuban Government. Some of these Cuban nationals are or were stockholders, directors or officers of Cuban corporations intervened and taken over by the Castro Government in Cuba.

Some of the Cubans residing in Florida have instituted suits in state and federal courts in Florida involving controversies which arose in Cuba or which are governed and controlled by Cuban laws and decrees. Some courts have assumed and exercised jurisdiction of such suits, and others have dismissed the same by applying thereto the doctrine of *forum non conveniens* or the Act of State doctrine, or both doctrines.

Some of these suits have brought into consideration important and difficult questions in the field of international law. The case at bar is among them, and involves questions of international law and relations between the executive and judicial branches of the United States Government.

At the present time there are pending before this Court, on petitions for writs of certiorari, three other cases involving the Act of State doctrine and its applicability to acts or decrees of the Republic of Cuba,

to-wit, *Banco Nacional de Cuba v. Sabbatino,* No. 403; *Pan-American Life Insurance Company v. Pedro Menendez Rodriguez* and *Pan-American Life Insurance Company v. Maria Cristina Vento Jaime,* No. 792; and *Aetna Insurance Company v. Pedro Menendez,* No. 793. These cases, together with the instant suit, bring before this Court three different types of Cuban decrees or laws, described hereinbelow, pursuant to which the Cuban Government took over property in Cuba.

Executive Power Resolution No. 1 under Law No. 851, of July 6, 1960, was involved in *Banco.* That resolution was issued on August 6, 1960, and expropriated all property and enterprises located in Cuba owned or operated by nationals of the United States, or enterprises in which nationals of said country had a predominate interest. Said resolution was expressly in retaliation for the action of the United States in reducing the sugar quota allotted to Cuba.

Law No. 151 of 1959 was involved in *Pan-American* and in *Aetna.* The said law declared certain Cuban nationals to be traitors and confiscated their properties, but it did not purport to apply to nationals of other countries or to properties of nationals of other countries.

Resolution No. 20260 of September 15, 1960, of the Ministry of Labor is involved in this suit (App. D, pp. 29-34, *infra*). By said resolution the Republic of Cuba intervened and took over the entire Cuban tobacco industry, including leaf tobacco dealers and warehouses, and cigar and cigarette factories. The respondent was one of the leaf tobacco dealers.

The intervention and taking control of the Cuban tobacco industry by the Castro Government, as recited at length in the resolution effecting the intervention, were for reasons of public interest, welfare and concern, and were acts of a sovereign or governmental nature (Jure Imperii) and were not acts of a business or commercial type (Jure Gestionis). *Jorge v. Antonio Company,* 19 Fla. Supp. 101, 105 (Fla. Cir Ct. 1961), App. F, p. 50, *infra.* The said intervention was not retaliatory against acts of the United States. The said intervention was not for purely political, persecutory, discriminatory, racial or confiscatory motives. *Jorge v. Antonio Company, supra.*

The basic controversy involved in this suit is between the Republic of Cuba and its nationals as to which is entitled to collect in the name of respondent, a Cuban corporation, a debt due to respondent. The only parties to this suit, however, are the respondent, a Cuban corporation, and petitioner, a Florida corporation. Neither the Republic of Cuba nor the Cuban nationals who instigated this action in the name of respondent are parties herein. In that respect, this suit differs from cases in which the decrees of the Castro Government are attacked directly in suits by or against the Republic of Cuba or its agencies. See *Banco Nacional de Cuba v. Sabbatino,* 307 F. 2d 845 (2d Cir. 1962); *Pons v. Republic of Cuba,* 294 F. 2d 925 (D.C. Cir. 1961), *cert. den.,* 368 U.S. 960 (1962); *Kane v. National Institute of Agrarian Reform,* 18 Fla. Supp. 116 (Fla. Cir. Ct. 1961). Therein the Republic of Cuba or its agency was before the court as a party. See *Jorge v. Antonio Company, supra,* 19 Fla. Supp. 108, App. F, p. 59, *infra.*

In this suit, the acts or decrees of the Castro Government are being attacked collaterally or indirectly in the name of the respondent by those Cuban nationals who instituted this suit.

Because the Republic of Cuba is not a party and cannot be made a party without its consent, it will not be bound or affected by any judgment entered herein. The petitioner is therefore in the position of having to defend this suit, and of being exposed at some other time to a suit by the Republic of Cuba on the same claim.

Although the said acts and decrees of the Republic of Cuba are attacked indirectly herein, the Act of State doctrine, discussed hereinbelow, is as applicable as though the acts and decrees were under direct attack. *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1917); *Ricaud v. American Metal Co.*, 246 U.S. 304 (1917). See also *Fraizer v. Foreign Bondholders Protective Council*, 125 N.Y.S. 2d 900, 903 (1953).

There are special and important reasons hereinbefore set forth and hereafter to be stated why this Court should review on writ of certiorari the judgment of the court of appeals.

A. The court of appeals erred in deciding that American courts are not compelled by the Act of State doctrine to give full force and effect to the intervention decrees of the Castro Government in Cuba, and in requiring the district court to determine whether the decrees of the Cuban Government relating to the intervention and taking control of respondent are confiscatory or otherwise violative of fundamental concepts of justice and, therefore, without status in the respondent's suit against the petitioner.

In *Underhill v. Hernandez*, 168 U.S. 250 (1897), this Court said, at p. 252:

> "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of another done within its own territory."

To the same effect, see *Oetjen v. Central Leather Co., supra; Ricaud v. American Metal Co., supra; American Banana Co. v. United Fruit Company,* 213 U.S. 347 (1909); *Shapleigh v. Mier,* 299 U.S. 468 (1937); *United States v. Belmont,* 301 U.S. 324 (1937); *United States v. Pink,* 315 U.S. 203 (1942).

In *Ricaud v. American Metal Co., supra,* this Court held that the district court was bound by and could not review the acts of the Carranza revolutionary government in Mexico in seizing a quantity of lead bullion belonging to an American citizen.

Likewise, in *Oetjen v. Central Leather Co., supra,* this Court held that the seizure of hides in Mexico by General Villa as a military contribution could not be reviewed, saying, 246 U.S. 303:

> "To these principles we must add that 'every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory. * * *'"

In *American Banana Co. v. United Fruit Company, supra,* where the plaintiff therein sought damages under the Sherman Anti-trust Act for the alleged tort of the defendant in instigating the government of Costa Rica to seize the property of plaintiff in that country, this Court held that such a seizure by a state is not a thing which can be complained of elsewhere in the courts, and that the very meaning of sovereignty is that the decree of the sovereign makes law.

It is a well established principle that what another country has done in the way of taking over property of its nationals, and *especially of its corporations*, is not a matter for judicial consideration in the courts of this country, and that such nationals must look to their own government for any redress to which they may be entitled. *United States v. Belmont, supra; Oetjen v. Central Leather Co., supra, Pons v. Republic of Cuba, supra; Banco de Espana v. Federal Reserve Bank*, 114 F.2d 438 (2d Cir. 1940); *Bollack v. Societe Generale Pur Favoriser, Etc.*, 177 Misc. 136, 30 N.Y.S. 2d 83 (1941); *M. Salimoff & Co. v. Standard Oil Co.*, 262 N.Y. 220, 186 N.E. 679 (1933); *Holzer v. Deutsche Reichsbahn-Gesellschaft*, 277 N.Y. 474, 14 N.E. 2d 798 (1938); *Dougherty v. Equitable Life Assur. Soc.*, 266 N.Y. 71, 193 N.E. 897 (1931); *Kleve v. Basler Lebens-Versicherungs-Gesellschaft*, 45 N.Y.S.2d 882 (1943); *Bloch v. Basler Lebens-Versicherungs-Gesellschaft*, 73 N.Y.S. 2d 523 (1947); *Jorge v. Antonio Company, supra*, App. F, p. 50, *infra*

In *United States v. Belmont, supra*, the United States sought to recover a sum of money deposited by Petrograd Metal Works, a Russian corporation, with August Belmont, a private banker, prior to 1918. In 1918 the Soviet Government enacted a decree by which it nationalized and appropriated all of said corporation's property and assets, including aforementioned deposit. In 1933, the Soviet Government assigned to the United States the said deposit account, and thereafter, the United States sued to recover the same. After recognizing the applicability of the Act of State doctrine, as stated in *Underhill v. Hernandez, supra*, and other cases cited hereinabove, this Court further held, 301 U.S. 332:

> "* * * What another country has done in the way of taking over property of its nationals, *and especially of its corporations*, is not a matter for judicial consideration here. Such nationals must look to their own government for any redress to which they may be entitled. * * * " (Emphasis Supplied)

Thus, this Court precluded a judicial consideration of matters of the kind which the court of appeals required the district court to consider.

In *Pons v. Republic of Cuba, supra,* wherein one of the issues was the alleged illegal expropriation in Cuba by the Castro Government of the property of a Cuban national, the court invited the State Department to file briefs, if it should see fit, expressing its views on the issues involved, but no brief was filed, and the court applied the Act of State doctrine and declined to sit in judgment on the decree of expropriation.

In ***Bernstein v. Van Heyghen Freres, S.A.,*** 163 F.2d 246 (2d Cir. 1947), *cert. den.,* 332 U.S. 772, the Act of State doctrine was applied to defeat the claim of a former German Jew to property taken from him by confiscatory and discriminatory acts of the Nazi Government in Germany.

Following the last cited decision, the State Department relieved American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of acts of Nazi officials. In another case brought by ***Bernstein,*** the court of appeals amended its earlier decree, 173 F.2d 71 (2d Cir. 1949), and ordered the district court to try the case on the merits. ***Bernstein v. N. V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij,*** 210 F.2d 375 (2d Cir. 1954).

The *Bernstein* cases disclosed that a court will not review the acts of a foreign sovereign affecting property within its territory unless the Executive Branch states, in some formal manner, that it has no objection to such examination.

In the case at bar, the court of appeals considered that the case of *Banco Nacional de Cuba v. Sabbatino, supra,* was dispositive of the issues raised by the respondent's appeal. The court of appeals, however, overlooked that, in *Banco,* that court was careful to make clear that its opinion did not apply to the situation where the expropriation decrees of a sovereign nation were directed against its own nationals, saying, 307 F. 2d 861:

> "The appellant argues that the Cuban decree against C.A.V. did not violate international law because C.A.V. was organized under the laws of Cuba. It is generally accepted, as appellant says, that acts of a state directed against its own nationals do not give rise to questions of international law. Zander, *The Act of State Doctrine,* 53 Am.J. Int'l Law 826, 836 (1959); 1 Oppenheim, International Law, 268 n.2 (8th ed. 1955); Friedman, Expropriation in International Law 163 (1953); see *M. Salimoff & Co. v. Standard Oil Co.,* 262 N.Y. 220, 186 N.E. 679 (1933). * * *"

The court of appeals, in the decision sought to be reviewed said (App. B, p. 24, *infra*):

> "* * * it matters not whether the thrust of those decrees be directed against Cuban nationals or American citizens. * * * The action of the Cuban agent was dismissed in the *Banco* case, and for the same reasons we reverse the dismissal of the complaints here."

The court of appeals did not recognize the distinction upon which the decision in *Banco* was made. As a consequence, it entered a judgment in conflict with the *Banco* decision as well as with the decision in the *Pons* case.

The court of appeals overlooked that the intervention decree against the respondent applied to the entire Cuban tobacco industry. No discrimination was involved. The stockholders of respondent are not American citizens but are Cuban citizens. On the other hand, the expropriation decree which was held invalid in *Banco* applied only to the property and enterprises of United States nationals or to operators of enterprises in which United States nationals had an interest or participation, and was adopted in retaliation against the United States for reducing the sugar quota allotted to Cuba.

No American court, other than the court of appeals, has assumed jurisdiction to look into or pass upon the validity of acts of the Castro Government in expropriating in Cuba property situated there and belonging to Cuban nationals or to enterprises organized under Cuban laws in which Cuban nationals have the predominant interest.

The court of appeals also erroneously decided, based upon the *Banco* decision, that the State Department had expressed the conclusion that our courts are not restrained from adjudicating the effect of the expropriation decrees of the Castro Government in Cuba.

B. There has been no statement issued by the State Department that it has no objection to American courts sitting in judgment on expropriation decrees of the Castro Government.

In *Banco Nacional de Cuba v. Sabbatino, supra,* at p. 858, the court assumed that it had a letter from the State Department of the type issued in connection with the *Bernstein* litigation, *supra.*

The court of appeals, in the case at bar, decided that consistently, repeatedly and concurrently the State Department has expressed its conclusion that our courts are not restrained from adjudicating the effect of the expropriation decrees of the Castro Government. The court of appeals was so sure of the accuracy of its decision in this regard that, although it recognized that in the record before it there was no expression of any kind from the State Department, it said it felt that it could rely upon its conclusion without the necessity of a formal enunciation in each and every case. The fact of the matter is, however, that the court of appeals in the case at bar and the court which decided the *Banco* case both erroneously assumed that the State Department had stated that it had no objection to American courts sitting in judgment on Cuban expropriation decrees.

In Case No. 403, now pending in this Court, a petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit has been filed by *Banco Nacional de Cuba,* as petitioner, versus *Peter L. Sabbatino, as Receiver, et al,* as respondents. In that proceeding, this Court, by its order dated November 20, 1962, invited the Solicitor General to express the views of the United States.

Thereafter, the Solicitor General filed a Memorandum for the United States. A copy of the same, sans exhibits, is printed in App. E, pp. 40-49, *infra.*

It clearly appears from the government's memorandum that there has been no expression by the State Department that it has no objection to the courts of this country sitting in judgment on the expropriation decrees of the Cuban Government affecting property in Cuba (App. E, pp. 45-49, *infra*). The most that representatives of the State Department have done is to refuse to express an opinion upon whether the Cuban nationalizations should be given effect in our courts either because of the Act of State doctrine or for any other reason or to make a statement of "no comment" (App. E, p. 49).

It, therefore, appears that the decision of the court of appeals with respect to the Act of State doctrine was based upon a false premise and should be reviewed.

2. That part of the decision sought to be reviewed which relates to the doctrine of *forum non conveniens* is in conflict with applicable decisions of this Court and of other courts of appeals on the same matter.

The court of appeals stated that the district court's application of the doctrine of *forum non conveniens* was not an abuse of discretion by the district court in the application of a traditionally equitable doctrine, but was an erroneous application of law to the established facts (App. B, p. 14, *infra*). The court of appeals then set forth two principles of law which it stated the district court erroneously failed to apply, thereby requiring reversal of the district court's judgment of dismissal. One of said principles is the established judicial policy in the field of maritime law in cases involving foreign suitors that where controversies are *communis juris* jurisdiction should be taken unless to do so would work an injustice (App.

B, p. 15, *infra*). The other is that, to be entitled to a dismissal on the ground of *forum non conveniens*, a defendant must show (a) that there is another forum open to the plaintiff in which the defendant is amenable to process, and (b) that the plaintiff can obtain justice in such forum (App. B, pp. 15-16, *infra*).

The petitioner respectfully submits that the decision of the court of appeals conflicts with applicable decisions of this Court and other courts of appeals in four basic respects. First, absent a determination that the district court exceeded its powers or the bounds of its judicial discretion, the court of appeals should not have reversed the judgment of dismissal of the district court. Secondly, the decision of the court of appeals departs from the rule of law that a court sitting in one state will, as a general rule, decline to interfere with or control the management of the internal affairs of a foreign corporation. Thirdly, in suits which were not between foreigners and that did not involve maritime controversies which were *communis juris*, the court of appeals should not have held that the district court should have taken jurisdiction unless to do so would work an injustice. Fourthly, the court of appeals should not have imposed upon the petitioner the burden of showing that the respondent could obtain justice in the courts of Cuba.

It also should be noted that at the time the district court rendered its judgment of dismissal there was a case pending in the Circuit Court of Hillsborough County, Florida, No. 122714-C, in which the plaintiffs were the respondent, Tabacalera Severiano Jorge, S. A., and Severiano Jorge, a Cuban citizen, and the defendants were the petitioner, Standard Cigar Company, The

Antonio Company, a Florida corporation, and the Republic of Cuba, which case involved substantially the same matters as were involved in the suit filed in the district court by respondent against petitioner. At the time the district court dismissed respondent's suit, the state court had not acted, but subsequently the state court dismissed that suit on the grounds urged here. A copy of the opinion and final decree of the state court is printed as App. F, pp. 50-65, *infra*. The opinion of the state court is reported as *Jorge v. Antonio Company*, 19 Fla. Supp. 101 (Fla. Cir. Ct. 1961). An appeal from the state court's dismissal was taken and is pending in the District Court of Appeal of Florida, Second District.

A. The application of the doctrine of *forum non conveniens* is entrusted to the discretion of a district court to be exercised upon equitable considerations, and a district court's determination may not be disturbed on appeal except for a clear abuse of discretion. *Gulf Oil Corporation v. Gilbert*, 330 *U.S.* 501 (1947); *Hopson v. Hopson*, 221 F.2d 839 (D.C.Cir.1955); *Simons v. Simons*, 187 F. 2d 364 (D.C. Cir. 1951); *The Mandu*, 102 F. 2d 459 (2d Cir. 1939); *The Kanto Maru*, 112 F. 2d 564 (9th Cir. 1940). This is also the law of Florida. *Southern Railway Company v. Bowling*, 129 So. 2d 433 (Dist. Ct. App. Fla., 3rd Dist. 1961).

The leading case on the doctrine of *forum non conveniens* is *Gulf Oil Corporation v. Gilbert, supra*. In that case, a judgment of the district court dismissing an action on the ground of *forum non conveniens* was reversed by the court of appeals, and the defendant brought certiorari. After a thorough discussion of the doctrine and of the applicable factors of private and public interest involved, this Court reversed the court of appeals. Much said in that case is applicable here.

It is the duty of a district court, having the parties before it, to apply all of the applicable law, including in those cases where it is appropriate, its discretionary judgment as to whether the suit should be entertained. *Gulf Oil Corporation v. Gilbert, supra,* 330 U.S. at 506.

In all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them. *Gulf Oil Corporation v. Gilbert, supra,* 330 U.S. at 506-507.

The principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute. *Gulf Oil Corporation v. Gilbert, supra,* 330 U.S. at 507.

The doctrine leaves much to the discretion of the court to which the plaintiff resorts, and experience has not shown a judicial tendency to renounce one's own jurisdiction so strong as to result in many abuses. *Gulf Oil Corporation v. Gilbert, supra,* 330 U.S. at 508.

If the combination and weight of factors requisite to given results are difficult to forecast or state, those to be considered are not difficult to name. An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Factors of public interest also have place in applying the doctrine. *Gulf Oil Corporation v. Gilbert, supra,* 330 U.S. at 508-509.

In the last cited case, this Court enumerated many specific private and public factors to be considered in applying the doctrine. Many of those factors were con-

sidered by the district court in the case by the respondent against the petitioner and several were set forth as findings in and constituted the basis of the judgment of dismissal of the district court (App. A, p. 1, *infra*).

In *Gulf Oil Corporation v. Gilbert, supra,* in reversing the court of appeals, this Court said, 330 U.S. at 512:

> "We are convinced that the District Court did not exceed its powers or the bounds of its discretion in dismissing plaintiff's complaint and remitting him to the courts of his own community. The Circuit Court of Appeals took too restrictive a view of the doctrine as approved by this Court. Its judgment is reversed."

The above cited decision of this Court conclusively established that a judgment of dismissal on the ground of *forum non conveniens* may not be reversed and must be affirmed unless the appellate court finds that the district court exceeded its powers or the bounds of its discretion in dismissing the suit.

Other courts of appeals have rendered decisions consistent with the decision of this Court in *Gulf Oil Corporation v. Gilbert, supra.*

In *Hopson v. Hopson, supra,* the court said, at p. 842:

> "Application of the doctrine of *forum non conveniens* is entrusted to the discretion of the District Court to be exercised upon equitable considerations, and its determination may not be disturbed on appeal except for a clear abuse of this discretion. * * *"

In *The Kanto Maru, supra,* in discussing the doctrine of *forum non conveniens,* the court said, at p. 565:

> "• • • This court has no power to exercise any discretion in the matter and can only reverse the decision of the District Court in case there has been an abuse of discretion by that court. • • •"

It is clear that the decision of the court of appeals is in conflict with the above cited decision of this Court and with the above cited decisions of other courts of appeals, all on the same matter.

It is important to note that there was no determination by the court of appeals that the findings of the district court set forth in its judgment of dismissal were not true or were not supported by the record.

The court of appeals did not find that the district court abused its discretion in applying the doctrine of *forum non conveniens* and did not reverse the district court's judgment on that ground (App. B, p. 14, *infra*). The court of appeals, in reversing the district court's dismissal of the respondent's suit without finding that the district court abused its discretion, decided in a manner contrary to the decision of this Court in *Gulf Oil Corporation v. Gilbert, supra,* and in conflict with the above cited decisions of other courts of appeals.

B. In deciding that the district court's judgment must be reversed, without finding or ruling that the district court abused its discretion in dismissing respondent's complaint and action on the ground of *forum non conveniens,* the court of appeals erroneously departed from the rule of law, established in decisions of this Court and other courts of appeals, that a court

sitting in one state will, as a general rule, decline to interfere with the management of the internal affairs of a corporation organized under the laws of another state but will leave controversies as to such matters to the courts of the state of domicile. *Rogers v. Guaranty Trust Co.*, 288 U.S. 123, 130 (1933); *Koster v. Lumbermen's Mutual Casualty Co.*, 330 U.S. 518 (1947); *Weiss v. Routh*, 149 F. 2d 193 (2d Cir. 1945); *Kelly v. American Sugar Refining Co.*, 139 F. 2d 76 (1st Cir. 1943); *Alm v. American Hair & Felt Co.*, 91 F. 2d 354 (7th Cir. 1937). This principle is all the more vital where the corporation is organized and existing under the laws of a foreign country.

Conflicting demands for payment of the purchase price of the tobacco sold and delivered in Cuba by respondent, a Cuban corporation, to petitioner, a Florida corporation, were made upon petitioner by the Republic of Cuba (through its interventor) and by Cuban nationals who were stockholders, directors, officers or attorneys-in-fact of respondent at the time it was intervened and taken over by the Republic of Cuba (R. 10-12, 15-43). A basic issue in this suit is which of the aforesaid are entitled to manage the affairs of respondent, including the collection in the name of the respondent of the purchase price of said tobacco.

The district court after considering the issues involved in the suit before it, including the dispute over the right to manage the affairs of respondent and to collect said sum, declined to exercise its jurisdiction. The court of appeals reversed the district court's judgment and required it to determine the validity of said intervention (App. B, pp. 6-7, 24, *infra*). The decision of the court of appeals will require the district court

to determine who has the right to manage the internal affairs of a Cuban corporation and to collect the sum sued for herein. The decision conflicts with the cases cited hereinabove.

The leading case applying the principle that generally a court will decline to interfere with the management of the internal affairs of a foreign corporation is *Rogers v. Guaranty Trust Co., supra.* In that case the plaintiff filed a suit in New York against a New Jersey tobacco corporation and others complaining about the management of the affairs of said corporation relating to the issuance, allotment and sale of stock of the tobacco company. The district court, in the exercise of its discretion, dismissed the complaint without prejudice. This Court, concluded that the facts and circumstances clearly justified the district court's exercise of its discretion in declining to pass upon the merits of said controversy. This Court held, 228 U.S. 130-131:

> "It has long been settled doctrine that a court —state or federal—sitting in one state will, as a general rule, decline to interfere with, or control by injunction or otherwise, the management of the internal affairs of a corporation organized under the laws of another state but will leave controversies as to such matters to the courts of the state of the domicile. * * * While the District Court had jurisdiction to adjudge the rights of the parties, it does not follow that it was bound to exert that power. * * * It was free in the exercise of a sound discretion to decline to pass upon the merits of the controversy and to relegate plaintiff to an appropriate forum. * * * Obviously no definite rule of general application can be formulated by which it may be determined under what circumstances a court will assume jurisdiction of stockholders' suits relating to the conduct of internal affairs of

> foreign corporations. But it safely may be said that jurisdiction will be declined whenever considerations of convenience, efficiency, and justice point to the courts of the state of the domicile as appropriate tribunals for the determination of the particular case. * * * "

This Court conclusively established therein that, when the determination of a suit rests upon the control or management of the internal affairs of a foreign corporation, the court generally will decline to exercise jurisdiction and will leave controversies as to such matters to the courts of the state of domicile.

That the trial of a case will involve issues which relate to the internal affairs of a foreign corporation is an important factor showing the appropriateness of trial in a forum familiar with the law of the corporation's domicile. *Koster v. Lumbermen's Mutual Casualty Co., supra.*

In *Koster v. Lumbermen's Mutual Casualty Co., supra,* the plaintiff, a member and policyholder of Lumbermen's Mutual Casualty Company, sued it and others seeking an accounting by the other defendants to said insurance company for damages it had sustained and profits the other defendants had made on certain transactions. The said insurance company was organized under the laws of the State of Illinois, where it had its principal place of business. The president of said insurance company and another Illinois corporation were also named as defendants. The district court dismissed the suit without prejudice to a suit in another forum. The district court's dismissal was affirmed by the court of appeals and by this Court. This Court said that under the rule of *Rogers v. Guaranty Trust Co.,*

supra, a district court is free, in the exercise of a sound discretion, to decline to pass upon the merits of a controversy relating to the conduct of internal affairs of foreign corporations.

The aforesaid principle has been applied by several courts of appeals. *Weiss v. Routh, supra; Kelley v. American Sugar Refining Co., supra; Alm v. American Hair & Felt Co., supra.*

The decision sought to be reviewed conflicts with those cases as well as the cases cited hereinabove decided by this Court.

In *Alm v. American Hair & Felt Co., supra,* the plaintiffs brought a class suit in Illinois as holders of common stock to enjoin a Delaware corporation from redeeming its common stock and issuing it to others. The district court declined jurisdiction and dismissed the action without prejudice. The court of appeals affirmed, saying, 91 F. 2d 358:

> "We are convinced that the controlling issue, and in fact the only issue, here presented must turn upon whether the acts complained of concerned only the management and internal affairs of appellee, a foreign corporation. That question must be answered in the affirmative.
>
> * * *
>
> "Under such a state of facts the determination of whether the District Court should have taken jurisdiction was within that court's sound discretion. Rogers v. Guaranty Trust Co., 288 U.S. 123, 53 S. Ct. 295, 77 L.Ed. 652, 89 A.L.R. 720. We think that discretion was not abused in this case."

In *Kelly v. American Sugar Refining Co., supra,* the plaintiff, a citizen of Massachusetts, sued a New Jersey corporation which was doing business in Massachusetts. The plaintiff attacked the validity of an attempted ex-

tension of the life of the corporation and sought to recover the par value of his stock in the corporation together with his proportionate share of earned surplus as of the date the corporation's existence under its charter was to terminate. The district court dismissed the complaint, without prejudice, on the ground that it should not interfere with the internal affairs of a foreign corporation. The court of appeals concluded that the decision of the district court in declining to exercise jurisdiction was proper, citing *Rogers v. Guaranty Trust Co., supra*, and affirmed the district court's judgment.

In *Weiss v. Routh, supra*, an action to recover loss in value of shares of capital stock resulting from a merger, the court of appeals reversed the district court's judgment of dismissal on the merits and held that the district court should have refused jurisdiction to entertain the action, saying, 149 F. 2d 195:

> "* * * When a trial involves 'the internal affairs' of a corporation, the rule is that the courts of a foreign forum will not assume jurisdiction over it; * * *"

Even though the doctrine of *forum non conveniens* is not applicable, because an alternate forum is not available, a suit may be dismissed, without prejudice, on the ground of non-interference in the internal affairs of a foreign corporation. *Goldstein v. Wometco Enterprises, Inc.*, 139 So. 2d 892 (Dist. Ct. App. Fla., 3d Dist., 1962). In the last cited case the lower court's dismissal of a complaint as to foreign corporations and an individual, without prejudice to plaintiffs seeking relief in an appropriate forum, was affirmed on the basis of the

doctrine of non-interference in the internal affairs of a foreign corporation although the doctrine of *forum non conveniens* was not applicable therein.

In the exercise of its discretion, the district court declined to interfere with the internal affairs of the respondent, a Cuban corporation, and correctly left the controversy as to who is entitled to manage the internal affairs of respondent and to collect the sum sued for herein to the courts of Cuba. The court of appeals erred in requiring the district court to determine that controversy.

C. The petitioner respectfully submits that the court of appeals erroneously held that the district court, in considering the petitioner's motion to dismiss the respondent's suit on the ground of *forum non conveniens,* should have applied the law set forth in *The Belgenland, supra,* and *Motor Distributors, Ltd. v. Olaf Pedersen's Rederi A/S, supra* (App. B, p. 15, *infra*).

The court of appeals held that trial courts have jurisdiction even of a suit between two foreigners "and that they will exercise it unless special circumstances exist to show *that justice would be better served by declining it*" (App. B, p. 15, *infra*). It further held that, instead of dismissing a suit in favor of a foreign court, jurisdiction should be taken unless to do so would work an injustice (App. B, p. 15, *infra*).

The holdings cited in the preceding paragraph are applicable only in the field of maritime law in cases involving foreign suitors and where controversies are *communis juris*. In those cases jurisdiction should be taken unless to do so would work an injustice. The

holdings cited in the preceding paragraph are wholly inapplicable to a suit of the kind instituted by the respondent against the petitioner. The pending suit does not concern maritime controversies. It concerns controversies over the payment of the purchase price of tobacco sold and delivered in Cuba. This case is not between foreign suitors. The respondent is a foreign corporation, but the petitioner is a Florida corporation. The controversies involved in the suit are not *communis juris*, i.e., they do not arise under the common law of nations. Instead, they arise under and are controlled by the laws of a single nation, to-wit, Cuba.

The Belgenland, supra, involved a ship collision on the high seas. All of the parties were citizens of foreign states and the ship sued in rem was of foreign ownership and registry. In that case, this Court said, 114 U.S. at 365:

> "* * * although the courts will use a discretion about assuming jurisdiction of controversies between foreigners in cases arising beyond the territorial jurisdiction of the country to which the courts belong, yet where such controversies are communis juris,—that is, where they arise under the common law of nations,—special grounds should appear to induce the court to deny its aid to a foreign suitor when it has jurisdiction of the ship or party charged. The existence of jurisdiction in all such cases is beyond dispute; the only question will be whether it is expedient to exercise it."

This Court said, 114 U.S. at 367:

> "The subject has frequently been before our own admiralty courts of original jurisdiction, and there has been but one opinion expressed, namely, that they have jurisdiction in such cases, and that they will exercise it unless special circumstances exist to show that justice would be better subserved by declining it."

This Court also said, 114 U.S. at 368:

> "Indeed, where the parties are not only foreigners, but belong to different nations, and the injury or salvage service takes place on the high seas, there seems to be no good reason why the party injured, or doing the service, should ever be denied justice in our courts."

This Court further said, 114 U.S. at 369:

> "Neither party has any peculiar claim to be judged by the municipal law of his own country since the case is pre-eminently one communis juris and can generally be more impartially and satisfactorily adjudicated by the court of a third nation having jurisdiction of the res or parties, than it could be by the courts of either of the nations to which the litigants belong."

Motor Distributors, Ltd. v Olaf Pedersen's Rederi A/S, supra, involved a libel in rem in admiralty in a district court in Florida against the *M/V Sunny Prince,* a Norwegian vessel, by nationals of other foreign countries in a cause arising out of the striking and sinking on the high seas of the *M/V Hoheweg* by the *M/V Sunny Prince.* The district court declined to take jurisdiction. The United States Court of Appeals for the Fifth Circuit reversed the judgment of the district court because the latter departed from the correct principle of law stated in *The Belgenland, supra.*

For the reasons hereinbefore set forth, it is abundantly plain that the court of appeals erred in holding that the district court should have applied the foregoing admiralty principle in the case at bar.

D. In deciding that, to be entitled to a dismissal of the respondent's suit on the ground of *forum non conveniens,* the petitioner must show that the respondent, a Cuban corporation, can obtain justice in the

courts of Cuba (App. B, pp. 15-16, *infra*), the court of appeals erroneously imposed upon the petitioner a burden which no other court ever has held to exist, and erroneously departed from the rule of law, established in decisions of this Court and other courts of appeals, that in all cases in which the doctrine of *forum non conveniens* comes into play it merely presupposes at least two forums open to the plaintiff in which the defendant is amenable to process and furnishes criteria for a choice between them. *Gulf Oil Corporation v. Gilbert, supra; Tivoli Realty, Inc. v. Interstate Circuit, Inc., et al.*, 167 F.2d 155 (5th Cir. 1948); *Vanity Fair Mills v. T. Eaton Co.*, 234 F.2d 633 (2d Cir. 1956); *De Sairigne v. Gould*, 83 F. Supp. 270 (S.D.N.Y. 1949), *aff'd*, 177 F.2d 515 (2d Cir. 1949), *cert.den.*, 339 U.S. 912 (1950); *Heine v. New York Life Ins. Co.*, 50 F.2d 382 (9th Cir. 1931), *affirming* 45 F.2d 426 (D.C. Ore. 1930).

This Court did not require a showing by the defendant in *Gulf Oil Corporation v. Gilbert, supra*, that the plaintiff therein, a Virginia resident, could obtain justice in the courts of Virginia to which this Court remitted him. In that case, this Court was convinced that the district court did not exceed its powers or the bounds of its discretion in dismissing the plaintiff's complaint and remitting him to the courts of his own community, and did not inquire as to whether the courts of his own community would give him justice. This Court affirmed the district court and reversed the court of appeals, which it said had taken too restrictive a view of the doctrine of *forum non conveniens*.

In *Heine v. New York Life Ins. Co., supra,* a suit by a German citizen to recover the cash surrender value of insurance policies issued in and payable in Germany was filed in a state court in Washington and thereafter was removed to a federal district court. The district court, in the exercise of its discretion to retain or reject jurisdiction, dismissed the action. In dismissing that suit, the district court did not inquire, and was not required to inquire, whether the plaintiff would receive justice in another forum. The dismissal of the suit was affirmed by the United States Court of Appeals for the Ninth Circuit.

The Court of Appeals for the Second Circuit did not require a showing that the courts of Canada would afford justice to the plaintiff in *Vanity Fair Mills v. T. Eaton Co., supra,* when it remitted that part of plaintiff's claim resting on Canadian law to Canadian courts. There a Pennsylvania corporation had sued two Canadians alleging the infringement of a United States trade-mark by a Canadian trade-mark and unfair competition both in the United States and Canada. The district court held that it lacked subject matter jurisdiction over that part of the complaint raising Canadian trade-mark issues. The court of appeals held that the district court did not abuse its discretion in declining to exercise its jurisdiction over that portion of the case arising in Canada and governed by Canadian trade-mark law. Neither the district court nor the appellate court inquired whether a Canadian court would afford justice to the plaintiff. There was and is no such prerequisite to the application of the doctrine of *forum non conveniens.*

In *De Sairigne v. Gould, supra,* the United States Court of Appeals for the Second Circuit affirmed the decision of the district court to remit the plaintiff, a citizen of France, to the courts of France, where the agreement in controversy had been made. Whether or not the courts of France would render justice to the plaintiff was not held to be a requirement for applying the doctrine of *forum non conveniens.*

In this suit, the district court found that the issues involved are governed and controlled by the laws, decrees, declarations and proclamations of the Republic of Cuba. In addition to the intervention decree, there are other laws and decrees of the Republic of Cuba involved herein. Decree No. 1384 was enacted on April 9, 1951 and provided that the currency of the United States would cease to be legal tender and to have debt-redeeming force in Cuba after June 30, 1951, and that all obligations contracted or payable in Cuba should be expressed and settled in the national currency of Cuba (App. D, pp. 35-38, *infra*). Law No. 568 was enacted on or about September 29, 1959 (App. D, p. 39, *infra*). Under the provisions of Law No. 568 it would constitute the commission of a felony by petitioner to pay in Miami the sum demanded by respondent. As shown in the cases cited hereinabove, that the law of a foreign country is involved in a case is an important factor showing the appropriateness of trial in another forum familiar with such law.

In *Prack v. Weissinger*, 276 F. 2d 446 (4th Cir. 1960), in reviewing the application of the doctrine of *forum non conveniens* to a suit by a citizen of West Germany against an American soldier stationed in Virginia for damages sustained in an automobile

accident which occurred in Germany while defendant was stationed there, the United States Court of Appeals for the Fourth Circuit said, 276 F.2d 448:

> "• • • Accordingly, by order filed November 13, 1958, he directed that the action be dismissed, 'without prejudice to institute the action *in any other appropriate court.*' (Emphasis supplied.) Such determination is consistent with the inherent power of federal courts to refuse jurisdiction of cases not within the purview of the provisions of 28 U.S.C.A. § 1404 (a)—cases which should have been brought in a foreign jurisdiction rather than in the United States. Vanity Fair Mills v. T. Eaton Co., 2 Cir. 1956, 234 F.2d 633, 645; Wilson v. Kansas City Southern Ry., D.C.W.D.Mo. 1951, 101 F.Supp. 56, 60; Latimer v. S/A Industrias Reunidas F. Matarazzo, D.C.S.D. N.Y. 1950, 91 F.Supp. 469, 470; De Sairigne v. Gould, D.C.S.D. N.Y. 1949, 83 F.Supp. 270, 273. • • •"

The order referred to in the above quotation had been entered in another suit. There was no appeal therefrom. It thereafter was considered in connection with the review of another dismissal by a second federal district court in Virginia. The defendant was not required to show, in either of said suits, that the plaintiff could obtain justice in the courts of Germany.

As aforesaid, the district court's judgment of dismissal of respondent's suit against petitioner was without prejudice to the right of respondent to sue on its claim in "any other appropriate court." Any other appropriate court could be a state court in Florida in which the petitioner is amenable to process, or any appropriate court in Cuba or elsewhere. See *Prack v. Weissinger, supra.* As noted hereinabove, the respond-

ent and an individual did sue petitioner and others in the state court in Florida on the same matters that are involved in this suit and the state court dismissed said suit on the several grounds urged in this petition. *Jorge v. Antonio Company, supra,* App. F, p. 50, *infra.*

In its opinion, the court of appeals stated that the decision in *North Branch Products, Inc. v. Fisher,* 284 F.2d 611 (D.C.Cir.1960), *cert. den.,* 365 U.S. 827, was close in point in connection with the court's determination that the petitioner must show that the respondent could obtain justice in the courts of Cuba (App. B, p. 16, *infra*).

It is submitted that the facts in the last cited case are substantially different from those in the case at bar, and that the court of appeals, in concluding that the cited case is close in point herein, overlooked the difference in the citizenship of the parties concerned and the law of which sovereign controlled the controversies between the parties. In that case, a Michigan corporation sued a citizen of Michigan (but a resident of Canada) in a federal district court in the District of Columbia to determine rights in United States patents and patent applications. The district court dismissed on the ground that either a Michigan state court or a court in Canada would be a more convenient forum. The court of appeals reversed, stating that jurisdiction of the defendant could not be obtained in Michigan, and that there was no certainty that a Canadian court would be compelled to assume jurisdiction of an action filed in Canada by the plaintiff, a citizen of Michigan, against the defendant, a Canadian resident, relating to matters which arose in and were controlled by the laws of the United States.

The last mentioned case easily can be distinguished from the case at bar, and actually is more favorable to the position of the petitioner than that of the respondent. In that case, the controversy arose in the United States and was governed by the laws of the United States. In the case at bar, the controversies are controlled by Cuban laws. In that case, the plaintiff was an American corporation, and the defendant was a United States citizen residing in Canada. In the case at bar, the plaintiff is a Cuban corporation and the defendant is a Florida corporation. There, a suit was pending in the District of Columbia. Here, a suit is pending in the district court in Florida. There, the American court was not sure a Canadian court would assume jurisdiction of a suit by an American citizen in a Canadian court over a controversy controlled by patent and other laws of the United States. Here, it was and is shown that the plaintiff, a Cuban corporation, has a forum open to it in Florida where it has already sued petitioner on the same claim asserted herein, and that Cuban law controls the controversies. At all times material herein, the former stockholders of respondent could have litigated in Cuba with the respondent corporation, the Republic of Cuba and the latter's interventor. The situations are entirely different, and it is submitted that the cited case does not support the decision of the court of appeals.

The court of appeals did not cite any authority which sustained its holding that the petitioner was required to show that the respondent could obtain justice in the courts of Cuba. Actually the court's decision is a new rule of law which is in conflict with the above cited decisions of this Court and other courts of appeals.

The court's decision places an impossible burden upon any defendant who would invoke the doctrine of *forum non conveniens* because it is impossible for a defendant in one court to show that in any other court, whether the same be a state or federal court in this country or a court in some foreign nation, a plaintiff can obtain justice. For example, there is no way for a defendant to show that another court will not also apply the doctrine of *forum non conveniens*, as was the case in *Jorge v. Antonio Company, supra*, which involved the same parties involved herein and others, *Prack v. Weissinger, supra*, and *Kelly v. American Sugar Refining Co., supra*, or that another court will reach a just decision with respect to the rights of the plaintiff.

It is submitted that the court of appeals erred in imposing upon the petitioner the burden of showing that the respondent could obtain justice in the courts of Cuba.

E. It is submitted that the court of appeals erred in holding applicable to the facts in the case at bar the principles of law discussed under heading C and D, *supra;* that the findings of the district court which are set forth in its judgment were and are not subject to successful attack; that the district court correctly declined to interfere with the internal affairs of the respondent; that the district court, in applying the doctrine of *forum non conveniens* to the respondent's suit did not exceed its powers or the bounds of its judicial discretion; and that the decision of the court of appeals relating to the doctrine of *forum non conveniens* should be reviewed by this Court for the special and important reasons set forth above.

3. In stating that this case is companionable with Case No. 19130, *Pedro Menendez Rodriguez v. Pan-American Life Insurance Company and Maria Cristina Vento Jaime v. Pan-American Life Insurance Company,* that their component parts are identical in many respects and that the ultimate determination of the two appeals rests upon the same foundation, the court of appeals overlooked and failed to consider the differences in vital facts and circumstances between the two appeals. The petitioner submits that the reasons given by the court of appeals for reversing Case No. 19130 are wholly inapplicable in the case at bar.

CONCLUSION

For the foregoing reasons, it respectfully is submitted that this petition for a writ of certiorari should be granted.

DATED at Tampa, Florida, February 18, 1963.

Respectfully submitted,

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Of Counsel for Petitioner

In The Supreme Court of the United States

OCTOBER TERM, 1962

NO.

STANDARD CIGAR COMPANY,
a Florida corporation,

Petitioner,

vs.

TABACALERA SEVERIANO JORGE, S.A.,
a Cuban corporation,

Respondent.

CERTIFICATE OF SERVICE

The undersigned counsel for petitioner, Standard Cigar Company, certifies that a copy of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been furnished to Anderson & Nadeau, 1126 First National Bank Building, Miami 32, Florida, and to Bacon & Hanley, 524 Florida National Bank Building, St. Petersburg, Florida, attorneys for the respondent, Tabacalera Severiano Jorge, S. A., this 18th day of February, 1963, by depositing the same in a United States Post Office or mailbox, with first class postage prepaid, addressed to the aforesaid counsel of record for respondent at their respective post office addresses.

WILLIAM A. GILLEN
Counsel for Petitioner

APPENDICES

APPENDIX A

Judgment Below

IN THE

District Court of the United States

IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA.
TAMPA DIVISION

No. 3988-Civ. T.

TABACALERA SEVERIANO JORGE, S. A.,
a corporation,

Plaintiff,

vs.

STANDARD CIGAR COMPANY,
a Florida corporation,

Defendant.

FINAL JUDGMENT

The cause came on to be heard upon the motion to dismiss or to abstain from exercising jurisdiction filed herein by the defendant, Standard Cigar Company, and after considering the pleadings, the affidavit in support of said motion and the oral arguments of counsel for the plaintiff, Tabacalera Severiano Jorge, S. A., and said defendant, the Court finds:

A. The plaintiff, Tabacalera Severiano Jorge, S. A., is a corporation organized under the laws of the Republic of Cuba.

B. The defendant, Standard Cigar Company, is a corporation organized and existing under the laws of the State of Florida and having its principal place of business in Tampa, Florida.

C. All of the transactions, occurrences and matters involved in this suit took place in the Republic of Cuba, and the issues involved in this action are governed and controlled by the laws, decrees, declarations and proclamations of the Republic of Cuba.

D. The plaintiff's claim did not accrue within the jurisdiction of this Court.

E. The docket of this Court is crowded, and to permit this suit to be prosecuted would burden this Court unnecessarily with difficult and complicated litigation.

F. For the convenience of parties and witnesses and in the interest of justice, the plaintiff's claim best could be litigated and disposed of in the Republic of Cuba.

G. For the reasons hereinbefore stated, among others, this action should be dismissed on the ground of forum non conveniens.

It, therefore, is ORDERED and ADJUDGED as follows:

1. That the complaint of the plaintiff, Tabacalera Severiano Jorge, S. A., a Cuban corporation, and this action against the defendant, Standard Cigar Company, a Florida corporation, be and the same hereby are dismissed, without prejudice, however, to the right of the plaintiff to institute an action on his claim against the defendant in any other appropriate court.

2. That the defendant, Standard Cigar Company, a Florida corporation, do have and recover of and from the plaintiff, Tabacalera Severiano Jorge, S. A., a Cuban corporation, the costs expended by the plaintiff herein, the same to be taxed by the Clerk of this Court, and when so taxed let execution issue therefor.

DONE and ORDERED at Miami, Florida, the 22 day of May, 1961.

/s/ GEORGE W. WHITEHURST

U. S. DISTRICT JUDGE

United States Court of Appeals
FOR THE FIFTH CIRCUIT

October Term, 1961

NO. 19101

D. C. Docket No. 3988 Civil T.

TABACALERA SEVERIANO JORGE, S. A.,

Appellant,

versus

STANDARD CIGAR COMPANY,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before Cameron and Bell, Circuit Judges, and Carswell, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court with directions for further procedings not inconsistent with the opinion of this Court in Pedro Menendez Kodriguez vs. Pan American Life Insurance Company — Maria Christina Vento Jaime vs. Pan American Life Insurance Company, No. 19130;

It is further ordered and adjudged that the appellee, Standard Cigar Company, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Cameron, Circuit Judge, Concurs in the Result."

October 17, 1962

Issued:
Recoverable Costs:
Docketing cause, etc. $25.00

APPENDIX B

Opinion Below

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 19101

TABACALERA SEVERIANO JORGE, S. A.,
Appellant,

versus

STANDARD CIGAR COMPANY,
Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(October 17, 1962)

Before CAMERON and BELL, Circuit Judges, and CARSWELL, District Judge.

PER CURIAM: We conclude from a careful review of the entire record that the District Court's dismissal of the complaint must be reversed for the reasons stated in our opinion of this date in the case of *Pedro Menendez Rodriguez v. Pan American Life Insurance Company and Maria Christina Vento Jaime v. Pan American Life Insurance Company.*

The residual questions of law in this case not specifically dealt with in our opinion above are more properly determinable by the District Court upon full hearing on the merits.

This cause is reversed and remanded with directions for further proceedings not inconsistent with our opinion in the *Rodriguez* case.

REVERSED AND REMANDED for further proceedings.

CAMERON, Circuit Judge:

I concur in the result.

Opinion in Companion Case

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 19130

PEDRO MENENDEZ RODRIGUEZ

Appellant,

versus

PAN AMERICAN LIFE INSURANCE COMPANY,

Appellee.

MARIA CHRISTINA VENTO JAIME,

Appellant,

versus

PAN AMERICAN LIFE INSURANCE COMPANY,

Appellee.

Appeals from the United States District Court for the Southern District of Florida.

(October 17, 1962)

Before CAMERON and BELL, Circuit Judges, and CARSWELL, District Judge.

CARSWELL, District Judge: This case is companionable with two others also decided this date: No. 19139, *Pedro Menendez v. Aetna Insurance Company,* and No. 19101, *Tabacalera Severiano Jorge S.A. v. Standard Cigar Company.*

Their component parts are identical in many respects, and the ultimate determination made here rests upon the same foundation. All three cases were originated by Cuban nationals who have fled from the regime of Fidel Castro and seek redress in the courts of the United States for monies claimed due them under contracts with the respective original defendants. All of the named defendants are corporations organized and existing under the laws of one or another State of the United States. The jurisdictional power of the United States District Court to try these cases is not questioned. There is diversity of citizenship between the parties and all essentials of Title 28, United States Code, Section 1332, are met in each case. All three of the complaints were dismissed by the District Court on the classic doctrine of *forum non conveniens* in virtually identical orders granting virtually identical motions filed by the respective defendants.

We conclude that the dismissal of each of these complaints on this ground was erroneous. Our review cannot there end but must encompass other grounds asserted in support of the motions to dismiss.

In this particular appeal we have consolidated the separate cases of Pedro Menendez Rodriguez and Maria Christina Vento Jaime, appellants, against Pan American Life Insurance Company, appellee.

These suits were originally commenced in the Circuit Court of Hillsborough County, Florida, and defendant, a Louisiana corporation, removed this action to the United States District Court on the basis of diversity of citizenship. The plaintiffs sought declaratory decree that they were entitled to receive the cash surrender value of certain insurance policies issued by Pan American Life Insurance Company, appellee.

The complaints allege that on January 5, 1945 Pan American insured the lives of the plaintiffs in the amount of $20,000 each. The policies provided for an annual premium of $1,523.40 to be paid by each of the plaintiffs for twenty years. The policies were accepted by the defendant in New Orleans, Louisiana, and contained, among other provisions, the following: "All the payments relative to this policy be they on the part of the company or the insured will be verified in the City of New Orleans in the legal money of the United States." Another provision: "This policy is exempt from any restrictions as to residence, travel, or occupation." The policies contained provisions for automatic premium loans in the event of failure to make premium payments, and provisions for the surrender of the policy for its cash value.

The premiums were paid each year from January 5, 1945 through January 1958. The January 5, 1959 premiums were not paid and the automatic loan provisions came into effect. On September 23, 1959 Rodriguez paid to Neal Harrison, an agent for defendant in Tampa, Florida, $2,941.47 to apply against the premium loans which were due on January 5, 1959. Harrison accepted the check, and forwarded it to the defendant in Louisi-

ana. On October 6, 1959 the check was returned by the defendant, and payment refused. In July, 1960 plaintiffs demanded the cash value of the policies in Tampa and were refused. Plaintiffs were advised to make the premium payment in Cuba, and apply for their cash surrender value there. From January 5, 1945 until January 5, 1952 payments had been made in currency of the United States, in accordance with the terms and conditions of the policies. In April, 1951 the Cuban government under Batista decreed that all obligations due citizens of Cuba be paid in Cuban pesos, and all obligations incurred by Cubans were likewise to be paid in Cuban pesos. The policies contain a provision that the contract cannot be changed or modified except with the written consent of the defendant, and signed by the president, vice president, secretary or actuary. Neither the president, vice president, secretary or actuary ever executed written consent to any change or modification of the insuring agreement. Nevertheless, from January 1952 until January 1958 plaintiffs paid, and defendants accepted, payment of premiums in Cuban pesos.

After Pan American caused this action to be removed, it filed its answer and a motion to dismiss. In support of its motion, defendant urged that since the applications of insurance were executed in Cuba, and since the policies were delivered in Cuba, and the premiums paid in Cuba, therefore, all rights which plaintiffs claim are governed by the laws of Cuba. The argument concludes, therefore, that the United States District Court should abstain from exercising its jurisdiction.

In its answer, defendant denied that the subject matter of this suit was within the jurisdiction of the federal court, and claimed that this controversy is justiciable solely under the laws of Cuba and in the courts of Cuba.

Defendant claims that the laws of Cuba prohibited it from accepting the premium in Tampa, Florida, in the currency of the United States, and that it was prohibited by Cuban law from paying the cash value of the policies to plaintiffs. In addition, defendant claimed that due to the decree of confiscation, plaintiffs were no longer the owners of the policies, and were no longer entitled to receive the cash surrender value of the policies. The decree of confiscation was issued on April 7, 1959 by the government of Cuba, by mere publication of the names of those persons whose property was declared to be confiscated.

The attorney for defendant, by affidavit, averred that demand for payment was made by the Cuban government on defendant on September 20, 1960.

The District Court dismissed plaintiffs' complaints under the doctrine of *forum non conveniens* stating: The plaintiffs are citizens of Cuba, defendant is a United States corporation incorporated in Louisiana, and doing business in Florida; all the transactions took place in Cuba, and are, therefore, governed by Cuban law; the claim did not accrue within the jurisdiction of the court; the docket is crowded, and it would be a burden on the court to litigate the difficult legal questions which arise; for the convenience of the witnesses, and parties, and in the interest of justice; and for other reasons (not mentioned) the action was dismissed on the grounds of *forum non conveniens*.

It is noted that all events and declarations of the Cuban government occurred after plaintiffs had established residence in Tampa, Florida.

The dismissal of these complaints on the ground of *forum non conveniens* cannot be upheld.

It is perhaps well at the outset to note that we are *not* dealing here with the *transfer* of an action from one federal court to another. The Judicial Code (Title 28, United States Code) in Section 1404(a) has set up standards and procedures whereby one federal court may properly transfer an action to a more convenient federal forum where the action "might have been brought."

We are not here concerned with the delineation given by the courts to Section 1404(a), but we are concerned with the remnants of that statute's historical progenitor, the equitable tradition of *forum non conveniens.* The applicability of the doctrine in our court system has been greatly restricted. As Professor Wright has recently commented,

> "The doctrine of forum non conveniens has only a limited continuing vitality in federal courts. Section 1404(a) of the Judicial Code has replaced the doctrine whenever the more convenient tribunal is another federal court where the action 'might have been brought.' Where, however, there is no alternative federal forum, dismissal on the grounds of forum non conveniens is still permissible. In admiralty cases in particular it frequently happens that the more convenient forum is in a foreign country, and dismissal will then be ordered." 1 Barron & Holtzoff, Federal Practice and Procedure § 87, pp. 442-443 (Wright ed. 1960).

Forum non conveniens, as an equitable proposition, is

still available to the federal courts, despite its clear limitation, where the state court or the court of a foreign country is the alternative forum. See *Venue in the Federal Courts — The Problem of the Inconvenient Forum,* 15 U. Miami L. Rev. 237, 239 (1961); *Glicken v. Bradford,* 204 F. Supp. 300, 304 (S.D. N.Y. 1962).

In the instant case the District Court thus applied the doctrine under the theory that the courts of Cuba were open as an alternative. This we must reject, not upon grounds of abuse of discretion by the court in the employment of a traditionally equitable doctrine, but because we see it as an erroneous application of law to the established facts. There is a clear distinction between the review of transfer orders under 28 U.S.C. § 1404(a), which are interlocutory, and, therefore, reviewable rarely, if at all, and orders of dismissal which being final, are appealable as of right.[1]

The facts here are that Pan American removed, as a matter of right under the diversity statute, cause of action from the initial forum chosen by plaintiffs. The plaintiffs have vigorously sought hearing in the jurisdiction invoked by defendants themselves. The burden to establish good cause for dismissal is quite plainly upon the defendant, and it is still true that "unless the balance is strongly in favor of defendant, the plaintiff's choice of forum should rarely be disturbed." *Gulf Oil*

[1] See 1 Barron & Holtzoff, Federal Practice and Procedure § 86.7 (Wright ed. 1960). See also Chief Judge Tuttle's discussion of scope of review in *Motor Distributors, Ltd. v. Olaf Pedersen's Rederi A/S,* 239 F. 2d 463, 466 (5th Cir. 1956). It is noteworthy that in *North Branch Products, Inc. v. Fisher,* 284 F. 2d 611 (D.C. Cir. 1960), the appellate court reversed the dismissal without even discussing whether any deference need be paid to the trial judge's exercise of discretion.

Corp. v. Gilbert, 330 U.S. 501, 508 (1947). In this same case the Supreme Court said on pages 506, 507: "In all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them."

Following this reasoning, Judge Holmes expressed for this Court in 1948 the view that "At least two such forums must be open to the plaintiff before the doctrine comes into play; and they shall not be dependent merely upon the will or grace of the defendant, but must be provided by law." *Tivoli Realty, Inc. v. Interstate Circuit, Inc., et al.,* 167 F. 2d 155 at 156, 157.

In 1885 the Supreme Court held that the trial courts have jurisdiction even of a suit between two foreigners "and that they will exercise it unless special circumstances exist to show *that justice would be better served by declining it." The Belgenland,* 114 U.S. 355, 367 (1885). (Emphasis added). In 1956 Judge Tuttle, speaking for this court reversed a district court which had dismissed in favor of a foreign court, saying: "Instead of the rule being, as the trial court here stated, that jurisdiction should be denied unless such denial would work an injustice, the rule is, rather, that jurisdiction should be taken unless to do so would work an injustice." *Motor Distributors, Ltd. v. Olaf Pedersen's Rederi A/S,* 239 F. 2d 463, 465, (5th Cir. 1956). This year a district court observed that *forum non conveniens* "is a harsh rule, and is applied in rather rare cases . . . " *Glicken v. Bradford,* supra.

Defendant, under this test, must show that these plaintiffs, refugees from Castro's Cuba, can obtain

justice in the courts of Cuba. The law does not impose upon these Cuban refugees, any more than any other plaintiff, the burden of proving that they would have problems of health or legal difficulties in obtaining justice in the courts of Cuba. By like token, we need not and do not embark upon an international sea of judicial notice of the treatment of those who flee their native land and return to Castro's jurisdiction to contest their property rights with a Louisiana corporation.

A recent case from the Court of Appeals for the District of Columbia is close in point. *North Branch Products, Inc. v. Fisher,* 284 F. 2d 611 (CA DC 1960), cert. den. 365 U.S. 827. There the district court had dismissed an action on the ground that either a Michigan state court or a court in Canada would be a more convenient forum. This was reversed, the appellate court finding that the jurisdiction of a defendant would not be obtained in Michigan and said there was no certainty that a Canadian court would assume jurisdiction of the action. The court cited *Gulf Oil Corp. v. Gilbert, supra,* as authority for the proposition that there must be a clear showing that an alternative forum exists. It was held erroneous to dismiss in the absence of such clear showing.

There is no such showing on the record before us. The District Court's ruling dismissal on grounds that Cuba would be a more convenient forum was error because the standards discussed here were improperly applied to the established facts.

Appellant contends, however, that since it is a Louisiana corporation, the plaintiffs also have available as an alternative forum the courts of that state, and, therefore, the doctrine of *forum non conveniens* was properly invoked by the District Court though the order spoke in terms of more convenience in Cuba. This, it says, is basis enough, under established appellate rules, to sustain the dismissal. Assuming this to be so, arguendo, we still do not find anything suggested by this record that the case would be *more* conveniently tried in the Louisiana courts or anywhere other than the Tampa division of the United States District Court for the Southern District of Florida. The same burden of clear showing in this record is borne by the defendant, and this it has not carried. Indeed, we think it appropriate to note that should this defendant prevail on this dismissal, there is no assurance that a whole new round of jurisdictional jousting would not be open to invitation. If plaintiffs be required to go now to the Louisiana courts it is not illogical to assume that defendant could there, once again, invoke the doctrine of *forum non conveniens* on the ground that the Florida Courts would be convenient. That is where the plaintiffs started, but still no court would have touched the merits of the claim. Their quest for legal determination of their rights under contract with defendant should be answered.

As we observed in the beginning, transfers to other federal courts are quick and ready tools for our trial courts under 28 U.S.C. § 1404(a). But whether it be by transfer order under the statute or by dismissal order under the doctrine of *forum non conveniens* the plain-

tiff's privilege to choose, or not be ousted from, his chosen forum is highly esteemed.[2]

A second and even more crucial issue is raised on these motions to dismiss. Although not specifically mentioned in the District Court's findings upon which its dismissal orders were based, running through each record is the contention of appellees that the merits of appellants' respective claims, for one reason or another, are controlled by the law of Cuba. In each case it is urged that the confiscatory and other decrees of the Castro government are binding, that appellants' rights, if any, have been expropriated by Castro; that they have no standing in court as proper parties; that appellees are faced with the prospect of having to pay various officials of Castro's government the monies claimed by the appellees.

All of these contentions and others of similar vein, bring into consideration most sensitive questions of relationship of the government of Cuba, officially recognized by our government, to the United States, and the relationship of the executive branch of our government to the judicial.

Appellees urge that their showing on these points is adequate to support dismissal either as an adjunct of the *forum non conveniens* doctrine or as a separate and distinct proposition asserted in the name of the Act of State doctrine.

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[2]See 1 Barron & Holtzoff, Federal Practice and Procedure (Wright ed. 1960) § 86.3. The defendant's burden is to go to another existing forum and that this is actually so and not merely theoretically.

Despite some difficulty in forming a terse definition of the Act of State doctrine it is clear that both it and the doctrine of *forum non conveniens* have their origin in the broader concept of judicial self-restraint.

In essence the Act of State doctrine holds that American courts will not look into or pass upon the validity of the acts of foreign governments performed in their capacities as sovereigns within their own territories.[3]

It is not a rule of international law but is instead a rule of the conflict of laws.

The Supreme Court first clearly recognized the doctrine in *Underhill v. Hernandez*, 168 U.S. 250 (1897). There it was said on page 252:

> "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves."

The development of the doctrine by the Supreme Court through the years has been reviewed in considerable detail recently by the Court of Appeals, Second Circuit, in a lucid and well reasoned opinion which we

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[3]An able discussion of the Act of State doctrine appears in the publication "International Law in National Courts", Proceedings of the Third Summer Conference in International Law, Cornell Law School, June 1960.

conclude should be dispositive of the issues raised by the subject litigation before this court. On July 6, 1962, Judge Waterman spoke for the Second Circuit, in *Banco Nacional de Cuba v. Sabbatino, et al.*, — F. 2d —, (CA 2nd Cir.) (Docket No. 27268) and there considered various exceptions to the Act of State doctrine. In *Banco v. Sabbatino* the court had under review a district court's summary judgment dismissing a complaint filed by the financial agent of the Cuban government against a New York state receiver who was holding proceeds of a shipment of sugar and other defendants as brokers who negotiated its sale in this country.

Fully cognizant of the sensitivity of the Court's role and carefully containing its sweep, the Court affirmed the dismissal of the complaint on summary judgment. We quote rather copiously from this opinion for it states well the basis for our determination that these complaints cannot be dismissed on the Act of State doctrine.

> " . . . when the executive branch of our Government announces that it does not oppose inquiry by American courts into the legality of foreign acts, an exception to the judicial abnegation required by the act of state doctrine has arisen and has been recognized both in this circuit and elsewhere. In *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F. 2d 375 (2 Cir. 1954) (*per curiam*), when we received word from the State Department that it was State Department policy to permit American courts to pass on the validity of acts done by Nazi officials, our court rescinded its earlier mandate based upon the act of state doctrine, preventing the district court

from questioning the validity of the acts of the German Nazi government. (Citing cases[4])

"This exception is applicable to the case before us. While the case has been pending we have been enlightened, as the Court was in the *Bernstein* case, *supra,* as to the attitude of the Department of State. In a letter, dated October 18, 1961, addressed to counsel for the *amici* in this case, the Legal Adviser to the State Department asserted:

> 'The Department of State has not, in the *Bahia de Nipe* case or elsewhere, done anything inconsistent with the position taken on the Cuban nationalization by Secretary Herter. *Whether or not these nationalizations will in the future be given effect in the United States is, of course, for the courts to determine.* Since the *Sabbatino* case and other similar cases are at present before the courts, any comments on this question by the Department of State would be out of place at this time. As you yourself point out, statements by the executive branch are highly susceptible of misconstruction.' (Emphasis added.)

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[4]See 173 F. 2d 71 (2 Cir. 1949). See also *Bernstein* v. *Van Heyghen Freres, S.A.*, 163 F. 2d 246, 252 (2 Cir.), cert. denied, 332 U. S. 772 (1947); Restatement, Foreign Relations Law of the United States § 44 (Proposed Official Draft, 1962); *Kane* v. *National Institute of Agrarian Reform,* No. 61 L. 730, June 8, 1961 (Fla. Cir. Ct.) [18 Fla. Supp. 116]; Association of the Bar of the City of New York, Committee on International Law, *Report, A Reconsideration of the Act of State Doctrine in United States Courts* 13 (May 1959); Zander, *The Act of State Doctrine*, 53 Am. J. Int'l L. 826 (1959).

"In a subsequent letter, dated November 14, 1961, the Under Secretary of State for Economic Affairs stated:

> 'I have carefully considered your letter and have discussed it with the Legal Advisor. Our conclusion, in which the Secretary concurs, is that the Department should not comment on matters pending before the courts.'

"On April 13, 1961, the State Department told the litigants in *Kane v. National Institute of Agrarian Reform*, No. 61 L. 730, (Fla. Cir. Ct.) (1961), a case that involved another confiscation by the Castro Cuban government of American-owned property in Cuba: 'Effect in U.S. of Decrees, etc. of Castro regime is question for court in which case heard.' These statements are somewhat ambiguous, perhaps intentionally so. But at the least they express a belief on the part of those responsible for the conduct of our foreign affairs that the courts here should decide the status here of Cuban decrees. Of course, if there is no good reason for abstention, a court should recognize and accept its fundamental responsibility to decide a case before it in accordance with whatever substantive norms may be relevant; and when, as here, the State Department is willing for the court to adjudicate the rights of the parties, one of the basic reasons for the act of state doctrine — the danger that independent judicial decisions might interfere with this country's foreign relations — is inapplicable to support abstention. The broad statements in

cases such as *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918) and *Shapleigh v. Mier*, 299 U.S. 468 (1937) could not have been intended by the Supreme Court to require a judicial avoidance of judicial responsibility in a case where the State Department has expressed a lack of concern as to the outcome of the litigation.

"But even though we perceive no danger to American foreign policy from a determination by an American court of the merits of this litigation presently before us, perhaps there is some other ground that compels us to accept without question the validity of the Cuban decree here involved."

The court then proceeded to examine the Cuban decrees involved and its ultimate conclusion was to the effect that they were confiscatory and without standing in our courts.

In these cases there are dismissal orders under review while in *Banco* there was a full review on the merits of summary judgment. There are also certain rather obvious factual distinctions in *Banco* and these cases under consideration here. But the legal principles enunciated are fully applicable. In *Banco* the action was brought by the Castro government's financial agent who sought to invoke Cuban decrees, found confiscatory in nature, to recover from New York defendants. Here we have Cuban nationals as plaintiffs seeking determination of their rights under contract with citizens of this country. The corporate defendants here, in effect, invoke as a bar to this litigation the decrees of Castro which would have the effect of erasing any rights of plaintiffs to monies which might be due them under contracts with American citizens. The point of convergence of these cases is clear: Our courts are not

compelled by the Act of State doctrine to give force and effect to the decrees of the Castro government in Cuba. On the merits it was determined in *Banco* that the subject Cuban decrees were confiscatory and their effect was nullified by the trial court, which was affirmed on appeal.

It is for the District Court to determine upon development of all the facts, by summary judgment or otherwise, whether the Cuban decrees are confiscatory or whether the particular decrees are otherwise violative of fundamental concepts of justice and, therefore, without status, in these particular cases.

If such decrees are found wanting by these standards it follows that they will not be given force and effect in our courts. The attempted enforcement of such decrees by the Cuban agent against American citizens was denied in *Banco*, and it matters not whether the thrust of those decrees be directed against Cuban nationals or American citizens. The American appellee corporation here is certainly no more subject to such decrees than others, and, as in *Banco*, is fully protected from confiscatory effect within the limit of the power of our courts. The action of the Cuban agent was dismissed in the *Banco* case, and for the same reasons we reverse the dismissal of the complaints here.

It is noted that, unlike the Second Circuit in the *Banco* case, we do not have in the records before us an expression of any kind from the State Department. None has been requested. With the fullest cognizance of the responsibility of the executive branch in the field of foreign relationships, we do not perceive any necessity for formal comment by the State Department about these cases.

Consistently, repeatedly and currently, the State Department has expressed its conclusion that our courts are not restrained from adjudicating the effect of the decrees of the Castro government in Cuba. This has now been made so clear we feel full reliance by the courts upon such expressions may be made without the necessity of a formal enunciation in each and every such case. Indeed, the wisdom of requesting another, and yet another, statement on the identical subject seems quite doubtful. It is specifically noted that there was judicial response to the executive branch's change in approach in *Bernstein v. Van Heyghen Freres, S.A.*, supra.

The other grounds asserted in support of these orders of dismissal have been considered and we find none of them, alone or together, sufficient. The crowded condition of the trial docket, the difficulty in determining applicable law in the construction of the contract, for example, are not reason enough to deny adjudication on the merits in view of our treatment here of the two broader issues. Residual issues raised on the present status of the pleadings are properly determinable by the District Court on the merits.

The orders dismissing the complaints are reversed and the causes remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

CAMERON, Circuit Judge:

I concur in the result.

APPENDIX C
ORDER DENYING REHEARING
IN THE
United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 19101

TOBACALERA SEVERIANO JORGE, S. A.,
Appellant,

versus

STANDARD CIGAR COMPANY,
Appellee.

On Appeal from the United States District Court for the Southern District of Florida.

(December 20, 1962)

ON PETITION FOR REHEARING

Before CAMERON and BELL, Circuit Judges, and CARSWELL, District Judge.

PER CURIAM: The factual distinctions between this case and *Rodriguez v. Pan American Life Insurance Company, etc.*, — F. 2d —, Case No. 19130, decided October 17, 1962, referred to by appellee in its petition for rehearing do not require a different application of law. For this reason, and for the reasons stated in denial of petition for rehearing this date in the case of *Rodriguez v. Pan American Life Insurance Company, etc.*, supra, this petition for rehearing is

DENIED.

Order Denying Rehearing in Companion Case

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 19130

PEDRO MENENDEZ RODRIGUEZ,
Appellant,

versus

PAN AMERICAN LIFE INSURANCE COMPANY,
Appellee.

MARIA CHRISTINA VENTO JAIME,
Appellant,

versus

PAN AMERICAN LIFE INSURANCE COMPANY,
Appellee.

On Appeal from the United States District Court for the Southern District of Florida.

(December 20, 1962)

PETITION FOR REHEARING

Before CAMERON and BELL, Circuit Judges, and CARSWELL, District Judge.

PER CURIAM: In reversing the dismissal of this complaint, and remanding for further proceedings, we noted then, and repeat now, that residual issues raised on the present status of the pleadings are properly determinable by the District Court on the merits. We carefully considered and reviewed the argument of appellee that the doctrine of *forum non conveniens* or Act of State doctrine, one or the other, barred further litigation. Our review of that holding in the light of the reiterated contentions of appellee in this petition does not require further hearing.

Appellee further suggests here that the Bretton Woods Agreement and certain Cuban currency control statutes require dismissal of this complaint. Since the entry of our opinion in this case this Court has on November 7, 1962 rejected this contention in *Pan American Life Insurance Company v. Inocencio Blanco,* No. 19569.

The petition for rehearing is

DENIED.

APPENDIX D

Statutes Involved

Resolution No. 20260, of September 15, 1960

RESOLUCION Nro. 20260

Considering provision No. 1156/80, supported by the law 647 of November 24, 1959, in the Department of Intervention of the Ministry and;

WHEREAS: The legal representatives of the Federcion Tabacalera Macional has been denouncing before this Ministry, the crises implanted in this sector as a consequence of the policies taken by the manufacturers of cigars, cigarettes, and tobacco warehouses, which has caused considerable deterioration in production, the displacement of a great number of laborers and grave injury to the national economy.

WHEREAS: It is evident, the egotistic attitude and frank hostility to the development of the economy of the nation, adopted by these owners in the Tobacco sector and the development of a narrow commercial policy which only seeks higher profits for their own personal gain, has extraordinarily diminished the production for internal consumption as well as that destined for exportation to the markets native to Cuba, this diminishment surpassing the 15 Million units in the first quarter of the current year, as a consequence of the excessive increase in prices.

WHEREAS: The patronizing attitude attempted against the economy of the nation and the workers has

been unlimited and has manifested itself in all aspects related to production, from the sale of the raw material which should be held in deposit in order to work the different types of blends, the laxity in acquiring the corresponding types of raw material from the new crops and the total abandonment of the various departments in the factories, has brought as a consequence, considerable deterioration in the quality of the product, which has been losing not only prestige, but also a market in the customary countries.

WHEREAS: The removal of the operating capital in the industry by the owners has further contributed to the ostentatious restriction and limitations of production, carrying on their activities exclusively by means of loans, principally from the States, which indicates the attitude of the owners is consciously directed to provoke a situation of disorganization and paralyzation of the industry with the consequent injury that this represents.

WHEREAS: The cigarette enterprises as well as the rest of the Tobacco magnates have participated in the resistance to elevate the crop, to buy the raw material, and to apply their own economic recourses for the development of these activities, relying for support of this, as allies, upon the large Leaf Tobacco Warehouseman.

WHEREAS: Some of these owners have abandoned their businesses and have left the National territory, leaving numerous debts and many workers unemployed, which constitutes an addition to the employment problem, which the Revolutionary Government and particularly this Ministry must avoid.

WHEREAS: It is necessary to guarantee the supply to the customary markets of Cuba, producing the tobacco in the quality that has always been characteristic of the Habana tobaccos and because of this, it placed upon the Revolutionary Government the necessity of adopting measures for the purpose of normalizing the situation created in the National Tobacco and Cigarette Industry, insuring the stability of the workers in their jobs and the production in general, which precedes the decision to intervene in the tobacco center, those who have concurred to the deeds heretofor expressed and who are: CIGAR FACTORIES; Nigos de J. Cano Y Cia., situated in San Gabriel No. 301, Cerro; Castaneda, Montero, Fonseca, S. A., Galiano 466, Habana; Cifuentes y Cia., Industria 520, Habana; Menendez, Garcia y Cia., Ltda., Amistad 407, Habana; F. Palicio y Cis. S. A., Maximo Gomez 51, Habana; Romeo y Julieta Fabrica de Tobacos S. A., Padre Varela 152, Habana; Tabacelera Cubana S. A., Agramonte 108, Habana; Tabacalera Pita Honos. S. A. Estevez 67, Habana; Por Larranaga, S. A., Carlos III No. 713, Habana, Tabacalera Jose L. Piedra S. A., Avenida 57 No. 13402, Marianso, Martinez y Cia., Avenida 51 No. 13606, Marianso; Tobacalera Moya S. A., Bayamo, Oriente; Bauza y Yanes, Agramonte y Republica, Cabaiguan, Las Villas; Roy del Mundo Cigar Co., Padre Varela 852, Habana; Villasmil Santalla Cia., Republica 2118, Artemisa, P. del rio; A. Quintero y Cia. S. L., D'Clouet 16-18, Cienfuegos. — CIGARETTE FACTORIES: Nijos de Domingo Mendez, Clavel No. 13, Habana; Torres Gener Enos. S. A., Meximo Gomez 51, Habana; Calixto Lopez y Cia., Agramonte 702, Habana; Cigarres H. Upmann S. A., 20 de Mayo 520, Habana; Villasmil Santalls y Cia., S. L., Campanario 1002; Trinidad Enos. S. A., Ranchuelo, L. V.; Tabacalero Cubana, S. A., Princess 202, Habana; Sres. Ranon Rodriguez o

Hijos, S. en C., 23 No. 1255, Vedado, Habana; Cia. Immobiliaria Arreyo Arenas, Villas; Triaidad Industrial S. A.. Santo Domingo No. 95. Trinidad, L. V.; Cigarrera Nacional S.A., Antonio Maceo y San Mateo, Santa Clara, L. V.; Fabries de Cigarros Camaguey S. A., Camaguey; Distribuidora Montemann S.A., 20 de May 520, Habana. LEAF TOBACCO WAREHOUSES: Cuba Tobacco S. A., Figuras 109, Habana, S. Ruppin Havana Tobacco Co. Inc., Carlos III No. 612, Habana; Rothschild-Samuel-Duigman, S.A., (Havana Tobacco), Dragones 108, Habana; J. B. Diaz y Cia., Paseo de Marti 115, Habana; Leslie Pantin & Son, Escobar 451, Habana; Toranoy Cia., Estrella 157, Habana; Tabacalera Nijos de Diego Montero S. A., Figuras 182, Habana; Custe Terane y Cia, Enrique Barnet 109, Habana; Junco y Cia., Lealtad 1013, Habana; N. Duys & Co., Havana Tobacco S. A., Calle Neva 75 Habana; Garcia y Vega, Virtudes 256, Habana; Tabacelera Severiano Jorege S. A., Amistad 360, Habana; Jose Torano Y Cia., Avenida Simon Bolivar 152, Habana; Cia. Tabacalera del Caribe S. A., Industria y Barcelona, Habana; Domingo-Mendez y Cia., Cardenas 115, Habana; Cuban Land and Leaf Tobacco Co., Agramonte 106 y Luyano 204, Habana; Pollack y Compania S.A., San Carlos 516, Habana; Liduvino Vizcaino Valdes, Estrella 619, Habana; Menendez y Cia., S. L., 24 No. 112 entre 11 y 13, Vedado; Menendez y Cia., Amistad 405, Habana; Menendez y Cia., Salud 59, Habana; Samuel Gordon & Compania S. L., Lealtad 612, Habana; Standard Havana Tobacco Co., Antonio Maceo 164, Santa Clara, L. V.

THEREFORE: Having heard the opinion of the Central Planning Congress and using the faculties conferred upon it, by Law 647 of November 24, 1959, modified in its Article 4, by the 843 of June 30, 1960.

BE IT RESOLVED:

FIRST:—Arrange the intervention of those named above by reason of this Resolution, for the period of one year.

SECOND:—Designate interventors from this Ministry in the industries referred to as follows:

(Names of the Interventors assigned to the companies intervened — Including Tabacalera Severiano Jorge, S. A., plaintiff)

THIRD:—Substitute in position and degree, the Directors of the intended industries intervened with the Interventors designated above, with the power to open bank accounts, open credit, accept, endorse, discount or in any other form negotiate payments, letters or any other commercial documents, solicit or obtain credit, carry on the operation of buying or selling the National or foreign currencies, take money or loans with or without guarantees, stipulate type of interests, maturity, location of payments, class of currency and all other particulars esteemed convenient. Contract when considered opportune for payments of current accounts.; Attach, mortgage or in any way encumber any benefits pertaining to the enterprises; buy, exchange, sell or in any other form operate in or with shares, bonuses, or other valuables; rent vaults, depositing in same and withdrawing its contents liberally; contract conditions of employment with the laborers and employees of these enterprises; also, subscribe collective contracts of work in their name, pay the stipulated wages of employees

and laborers; represent the enterprises legally in courts and out of courts and any other facility necessary for the development of its function.

FOURTH:—Order the designated Interventors to take inventory and appraisal of the goods and furniture pertaining to the intervened enterprises.

FIFTH:—Notify all parties in the proper legal procedure.

GIVEN in Habana, MINISTRY OF WORKS on September 15, 1960.

Decree No. 1384, of April 9, 1951

"WHEREAS, Law No. 13, of December 23, 1948 provided that the currency of the United States of American shall cease to be legal tender and to have debt redeeming force in the territory of the Nation one year after the date on which the 'Banco Nacional de Cuba' (National Bank of Cuba) commenced operating, unless the Chief Executive, on the recommendation of said Bank, should extend that period for another period not exceeding one year. And,

WHEREAS, the above mentioned authority to extend for one year the status of legal tender and debt redeeming force of the United States currency in the national territory ought to be construed to cover the possibility of extending said period for a shorter additional period, and to provide for its expiration in such a way that the effects of one and the other provision will not extend beyond said additional one year period. And,

WHEREAS, the 'Banco Nacional de Cuba' commenced operating on the 27th day of April, 1950, and then, within the first one year period allowed by said Law No. 13, of December 23, 1948, the Board of Directors thereof requested this Chief Executive to extend the status of legal tender and debt redeeming force of the United States currency in the national territory until June 30, 1951. And,

WHEREAS, the Board of Directors of said 'Banco Nacional de Cuba' has further recommended to this Chief Executive the adoption of certain supplementary regulations in connection with the cessation of said legal tender status and debt redeeming force on June 30, 1951.

NOW, THEREFORE: In pursuance of the powers vested in me by the Constitution and other statutes of the Republic, on the recommendation of the 'Banco Nacional de Cuba', as endorsed by the Minister of the Treasury, and with the approval of the Council of Ministers, I hereby,

RESOLVE:

First: To extend the status of legal tender and debt redeeming force of the currency of the United States of America in the territory of the Nation until the thirtieth day of June of the current year. Second: Beginning on the date on which the United States currency shall cease to be legal tender and have debt redeeming force in the territory of the Nation, all obligations contracted or payable in the national territory shall be expressed and settled in national currency pursuant to the provisions of Law No. 13, of December 23, 1948, subject to no exception other than those specified in Articles 96, 98 and 113 thereof. The debtors of obligations not included in said exceptions and the payment whereof in United States currency has been stipulated or agreed upon prior to the cessation of such legal tender status and such debt redeeming force, may settle such obligations at par through delivery of national currency in the same amounts as those previously expressed in United States dollars.

Third: Upon the cessation of the status of legal tender and debt redeeming force of the United States currency, all bank deposits theretofore kept under such denomination shall be subject to the provision contained in Article 98 of Law No. 13, of December 23, 1948, which shall be applied in accordance with the following rules:

(a) Banks may continue accepting and keeping deposits in United States currency and in any other foreign currency, but adhering to the provisions of this Decree and of Article 113 of Law No. 13 of December 23, 1948.

(b) All withdrawals of funds shall be made by means of non-transferable and non-negotiable documents drawn in accordance with the following form:

Non-transferable . . . . . Non-negotiable

(Name of the Bank)

Account No. .....

(Place and date)

Please pay to myself the sum of . . . . . .

. . . . . /100 Dollars and charge same to my account in United States Currency.

$ .....

(Signature of Depositor)

(c) If the Bank should choose, pursuant to the above-mentioned Article 98 of Law No. 13, of December 23, 1948, to pay in United States banknotes the withdrawals from bank deposits kept under the

denominations of United States currency, such payments shall be made without deducting any expenses, commissions or premiums at the expense of the depositor, who shall be entitled to the free disposition and possession of said currency; and,

(d) If the bank should choose to pay either in dollar drafts on New York or in national currency at the then current exchange rate, the election between one and the other form of payment under said Article 98 of Law No. 13 of December 23, 1948 shall be a privilege of the depositor, who by requesting the payment in a dollar draft shall be deemed to assume the customary transfer expenses and taxes.

Fourth: The 'Banco Nacional de Cuba' is hereby directed to attend to the enforcement of this Decree, and to adopt whatever additional regulations may prove necessary.

Done at the Presidential Palace in Havana this 9th day of April, the year 1951.

CARLOS PRIO SCARRAS
President

Felix Lancis
Prime Minister
Jose R. Alvarez
Minister of the Treasury

(Official Gazette *92, of April 20, 1951)"

Law No. 568, of September 29, 1959

"Article 1.—For the purposes of this law, the following are considered felonies of monetary, contraband. . . . (6) To export currency or securities, or to transfer funds to points abroad by means of checks, transfers, drafts, letter-orders, orders of payment, compensations, travellers' checks, letters of credit, reimbursements of collections, purchases or sales of passage tickets or through any other similar means, regardless of the origin or source of the funds, except for those cases authorized by the Currency Stabilization Fund, through a member bank or a firm duly authorized by Banco Nacional de Cuba.

. . . . . (10) To receive and credit to bank accounts kept abroad, or to transfer to third parties collections made abroad for business transactions or services rendered in Cuba, regardless of the source or origin of the respective funds.

Article 2.—The persons guilty of the felony of currency contraband referred to in the preceding article shall be liable to a penalty of imprisonment for from 6 months and 1 day to 3 years, or a fine of one to two thousand quotas, or both.

Article 3. a) Any person who sells or in any way assigns, transfers, or transmits currency, checks, drafts, orders of payment, travellers' checks or any similar paper in foreign currency shall be liable to imprisonment for from 6 months and 1 day to 3 years, or to a fine of one to two thousand quotas, or both.

Article 6— . . . . . The Currency Stabilization Fund is expressly authorized to order the intervention of any company, business or entity which is presumed to have infringed the provisions of this law."

APPENDIX E

Memorandum for the United States, Filed in *Banco Nacional de Cuba v. Sabbatino,* pending herein on petition for writ of certiorari, No. 403

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 403

BANCO NACIONAL DE CUBA, PETITIONER

v.

PETER L. F. SABBATINO AS RECEIVER, AND F. SHELTON PARR, WILLIAM F. PRESCOTT, EMMET WHITLOCK, LAWRENCE H. DIXON, H. BARTOW FARR, ELIZABETH C. PRESCOTT, FABIO FREYRE AND HELEN G. DOWNS, CO-PARTNERS DOING BUSINESS AS FARR, WHITLOCK & CO.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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MEMORANDUM FOR THE UNITED STATES

By order of the Court, dated November 20, 1962, the Solicitor General was invited to express the views of the United States. For the reasons indicated below, we believe that the case is one which warrants review by this Court.

1. Two broad and important questions are presented. The first is whether both courts below correctly held that they were not precluded by the Act of State doctrine from adjudicating the validity of certain acts of the Cuban Government. If that question is answered in the affirmative, a second question is posed, *i.e.*, by what standards are domestic courts to be guided in adjudicating the validity of the acts of the foreign state?

Specifically, this litigation involves a challenge to the seizure of property of a private corporation by a sovereign act of the Government of Cuba. As it happens, the plaintiff (petitioner in this Court) is not the former owner seeking to recover its property, but an agency of the foreign sovereign seeking to recover the property (or its proceeds) against a receiver appointed under a statute of the State of New York, who is holding the property for the benefit of shareholders of the former owner. New York Civil Practice Act, Sec. 977-b. In its essential aspects, the case is typical, however, of a large number of pending cases in which the jurisdiction of American courts has been invoked to challenge the validity of foreign nationalizations of property located, at the time of the taking, in the nationalizing country.

A series of such cases was brought in the United States after World War I arising out of nationalizations by the U.S.S.R. See *e.g. Sokoloff* v. *National City Bank*, 239 N.Y. 158, 145 N.E. 917 (1924); *Salimoff & Co.* v. *Standard Oil Co.*, 262 N.Y. 220, 186 N.E. 679 (1933); *Dougherty* v. *Equitable Life Assur. Soc.*, 266 N.Y. 71, 193 N.E. 897 (1934). More recently, nationalizations in Iran and Indonesia have stimulated a series

of cases in foreign courts, though not in the United States. See *e.g.* (Japan) ***Anglo-Iranian Oil Co.*** v ***Idemitsu Kosan Kabushiki Kaisha*** [1953], Int'l L. Rep. 305 (1953); (Aden) ***Anglo-Iranian Oil Co. Ltd.*** v. ***Jaffrate*** [1953], Int'l L. Rep. 316, 47 Am. J. Int'l L. 325 (Supreme Court of Aden, 1953); (Italy) ***Anglo-Iranian Oil Co. Ltd.*** v. ***S.U.P.O.R. Co.*** [1955], Int'l L. Rep. 19 (Court of Venice, 1953); (Italy) ***Anglo-Iranian Oil Co., Ltd.*** v. ***S.U.P.O.R. Co.*** [1955], Int'l L. Rep. 23 (Civil Court of Rome, 1954); (Germany) ***N.V. Verenigde Deli-Maatschapijen and N. V. Senembah-Maatschappij*** v. ***Deutsch-Indonesische Tabak-Handelsgesellschaft m.b. H,*** Landgericht Bremen, April 21, 1959, 1959 Aussenwirtschaftsdienst des Betriebsberaters 105; Oberlandesgericht Bremen, August 21, 1959, *ibid.*, 207; (Netherlands) ***Senembah Maatschappij N. V.*** v. ***Republik Indonesie Bank Indonesia and de Twentsche Bank N. V.,*** Court of Appeals of Amsterdam (1959), Nederlandse Jurisprudentie 218 (No. 73), affirmed (1959) Nederlandse Jurisprudentie 855 (No. 350).

The Cuban nationalizations, which affect in very substantial measure interests of United States citizens have already brought a number of challenges in our courts. As of December 5, 1962, 37 such cases (Appendix A; *infra*, pp. 11-13) were pending in the Southern District of New York alone, some of them involving millions of dollars. The instant decision, which has attracted very wide attention and has already been cited with approval in two Fifth Circuit cases (***Menendez Rodriguez*** v. ***Pan American Life Insurance Co.,*** No. 19130 decided, October 17, 1962; ***Pan American Life Insurance Co.*** v. ***Blanco,*** No. 19569, decided November 7, 1962) will doubtless have wide influence upon the disposition of this growing body of litigation.

The court below, affirming the decision of the District Court for the Southern District of New York, held that the acquisition of property in Cuba by the Government of Cuba was subject to review under standards of international law; that the decree by which the Cuban Government acquired the property was in violation of international law; and that, therefore, the Cuban Government could not be said to have title to the property. Thus the court of appeals has passed both upon the reviewability of an act of a foreign state and upon the question of the standards by which an act of nationalization is to be judged. Neither of these questions has been recently examined by this Court, and, in our view, both have substantial public importance.

2. In *Oetjen* v. *Central Leather Company*, 246 U.S. 297, and *Ricaud* v. *American Metal Company*, 246 U.S. 304, this Court held that the former owner of property confiscated by the Government of Mexico could not recover the property when it came into the United States, even if the property had been taken, as alleged by plaintiffs, in violation of international law. This was so, said the Court, because of the "principle that the conduct of one independent government cannot be successfully questioned in the courts of another * * *" (246 U.S. at 303). The *Oetjen* and *Ricaud* decisions were based on an earlier decision of this Court in *Underhill* v. *Hernandez*, 168 U.S. 250, in which Chief Justice Fuller, speaking for the Court, wrote (p. 252):

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.

The New York Court of Appeals has applied this doctrine to the acts of a *de facto* government not recognized by the United States (the Soviet Union), *Salimoff & Co.* v. *Standard Oil Co.*, 262 N.Y. 220, 186 N.E. 679 (1933), and the Court of Appeals for the Second Circuit has applied it to the acts of a government (Republic of Spain) recognized by the United States at the time of the act but not at the time of the decision of the case, *Banco de Espana* v. *Federal Reserve Bank*, 114 F. 2d 438. The Second Circuit also applied the doctrine to defeat the claim of a former German Jew to property taken from him as the result of confiscatory and discriminatory acts of the Nazi Government of Germany, *Bernstein* v. *Van Heyghen, Freres, S.A.*, 163 F. 2d 246, certiorari denied, 332 U.S. 772. In that case, the court said that, although the Government of Germany no longer existed and the alleged acts were incompatible with American standards, the remedies were up to the Executive Branch (through such means as the restitution and reparations procedures then being worked out) and that claims generated by the acts of the German state could not be adjudicated in our courts.

Following the decision in the first *Bernstein* case, counsel for the plaintiff wrote to the Department of State to ascertain the views of the Executive Branch. He received a reply (with copies for counsel to all the parties and the court) from the Acting Legal Adviser, Department of State, stating that:

> The policy of the Executive with respect to claims asserted in the United States for restitution of identifiable property (or compensation in lieu thereof) lost through force, coercion, or duress as a result of Nazi persecution in Germany, is

> to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials. [Dept. State Bull. 592 (May 8, 1949).]

In a subsequent case brought by the same plaintiff against different defendants, but upon substantially similar facts, the court of appeals, amending an earlier decree, 173 F. 2d 71 (C.A. 2), held that the letter from the Acting Legal Adviser removed the restraint the courts had been under in examining the acts of the foreign government, and ordered the district court to try the case on the merits. *Bernstein* v. *N. V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F. 2d 375 (C. A. 2).

3. The premise of the two *Bernstein* cases, read together, is that a court will not examine into the acts of a foreign state affecting property within the latter's territory unless the Executive Branch states, in some formal manner, that it has no objection to such examination. Cf. Restatement, *The Foreign Relations Law of the United States*, Sec. 44 (proposed official draft, May 3, 1962). We take no position at this time as to whether this is a permissible or desirable limitation on the Act of State doctrine. The court of appeals in the instant case assumed that it had a "Bernstein letter," 307 F. 2d 845, 858 (C. A. 2), but a full account of the correspondence and surrounding circumstances (which counsel did not lay before the court) makes it plain that the assumption was erroneous.

The correspondence in question (Appendix B, *infra*, pp. 14-43) took place between October 10, 1961 and November 21, 1961, *i.e.*, after the briefs in the court of appeals had been filed. In that interval, counsel for the receiver addressed one letter to the Secretary of State and counsel for the amici curiae directed 11 letters to members of the Executive Branch, including the Solicitor General, the Secretary of State, the Under Secretary of State for Economic Affairs, the Legal Adviser, the Deputy Legal Adviser and the Special Assistant to the Legal Adviser, Department of State, the Assistant Secretary of State for Inter-American Affairs, and the Administrator, Agency for International Development. While the letters differed in detail, the purpose of all of them was to obtain agreement from the Executive Branch with the position of the respondents and the amici curiae. They contrasted statements issued by the Department of State in the Summer of 1960 condemning the Cuban nationalizations with certain statements by the State and Justice Departments in the course of a lawsuit involving the M. V. *Bahia de Nipe* in August and September, 1961, *Rich* v. *Naviera Vacuba, S.A.*, 197 F. Supp. 710 (E.D. Va.) affirmed 295 F. 2d 24 (C. A. 4). Ultimately, they sought from the Executive Branch, and particularly from the Department of State, a clear declaration that would serve to lift any restraint upon the judiciary's examination of acts of nationalizations by the Government of Cuba.

The Department of State issued only one reply,[1] a letter from the Under Secretary of State for Economic Affairs, dated November 14, 1961, reading as follows:

[1] The Solicitor General's merely acknowledged receipt of the letter.

DEAR MR. LAYLIN: The Secretary has asked me to reply to your letter of October 24, 1962 to him concerning certain litigation in which your client, the Cuban-American Sugar Company, is interested.

I have carefully considered your letter and have discussed it with the Legal Adviser. Our conclusion, in which the Secretary concurs, is that the Department should not comment on matters pending before the courts.

Sincerely yours,

/s/ GEORGE W. BALL,

Under Secretary for Economic Affairs

In addition to the letter from Under Secretary Ball quoted above, the Court of Appeals was presented with another letter, written by the Legal Adviser of the Department of State. Since only part of that letter seems to have been presented to the court below (by means of Appendix V to the brief of the amici curiae, filed several months after the brief itself) and since the court apparently placed reliance on this letter, we shall set forth briefly the circumstances surrounding this letter and quote its full text.

In the weeks following October 10, 1961, Mr. John Laylin, counsel for the amici curiae, wrote letters to several members of the Executive Branch and also sought appointments in order to present his arguments in person. He had made a tentative appointment with Mr. Chayes, the Legal Adviser, but the latter was forced to cancel the appointment because of a trip abroad. Shortly before he left for Africa, Mr. Chayes telephoned to Mr. Laylin to cancel the appointment, discuss the case briefly, and to suggest that Mr. Laylin talk with his Special Assistant, Mr. Lowenfeld, and with

the Deputy Legal Adviser, Mr. Meeker, both of whom were familiar with the case. Confirming this telephone call, Mr. Chayes wrote the following letter to Mr. Laylin:

> DEAR JOHN: I received your letter of October 10, 1961, as well as the copy of your letter of the same date to George Ball, which he has asked me to answer. As I mentioned on the telephone this afternoon, I am about to leave on a two-week trip to Europe and Africa. Let me just confirm here briefly the thoughts I expressed to you over the telephone.
>
> The Department of State has not, in the *Bahia de Nipe* case or elsewhere, done anything inconsistent with the position taken on the Cuban nationalizations by Secretary Herter. Whether or not these nationalizations will in the future be given effect in the United States is, of course, for the courts to determine. Since the *Sabbatino* case and other similar cases are at present before the courts, any comments on this question by the Department of State would be out of place at this time. As you yourself point out, statements by the executive branch are highly susceptible of misconstruction.
>
> I am sure that you will have a fruitful discussion with Mr. Meeker and Mr. Lowenfeld, both of whom are well informed on all of these cases.
>
> With best regards,
>
> Sincerely yours,
>
> /s/ Abe,
>
> ABRAM CHAYES.

In our view, Mr. Chayes' letter was in effect a refusal to express an opinion upon whether the Cuban nationalizations should be given effect in the courts either because of the Act of State doctrine or for any other reason. Regardless of its meaning, however, the full letter, as well as the circumstances, makes it clear that Mr. Chayes was not making an official expression of the views of the Executive Branch. The letter of the Under-Secretary, Mr. Ball, represents nothing more than a statement of "no comment." Mr. Laylin's subsequent letters are obviously self-serving.

The Court's invitation to the Solicitor General, at this stage of the proceeding, apparently does not seek an expression of the views of the Executive Branch upon the substantive merits of the questions presented. In the event that a writ of certiorari is granted, as urged in this memorandum, the Solicitor General will undertake to present a full statement of the position of the Executive Branch and supporting argument upon the merits.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

DECEMBER 1962.

APPENDIX F

Final Decree In State Court Suit

IN THE

Circuit Court of the Thirteenth Judicial Circuit

OF THE STATE OF FLORIDA,
IN AND FOR HILLSBOROUGH COUNTY,
IN CHANCERY.

No. 122714-C

SEVERIANO JORGE and
TABACALERA SEVERIANO JORGE, S.A.,

Plaintiffs,

vs.

THE ANTONIO COMPANY, a Florida corporation, and STANDARD CIGAR COMPANY, a Florida corporation, and the REPUBLIC OF CUBA,

Defendants.

FINAL DECREE

This cause came on to be heard upon the motions of the defendant, The Antonio Company, a Florida coporation, to abstain from exercising jurisdiction on the grounds of forum non conveniens, to dismiss the complaint of the plaintiffs, Severiano Jorge and Tabacalera Severiano Jorge, S.A., a Cuban corporation, and to sever causes of action against the defendants, The Antonio Company and Standard Cigar Company and upon the motions of the defendant, Standard Cigar Company, a Florida corporation, to dismiss or to abstain from

exercising jurisdiction and to strike the plaintiff corporation as a party. After considering the pleadings, affidavits and certificate filed herein and the oral arguments and written briefs of counsel for the plaintiffs and said defendants, this Court is of the opinion that the plaintiffs' complaint and this suit should be dismissed, without prejudice, however, to the rights of the plaintiffs to prosecute their respective claims against the defendants, or either of them, in any other appropriate forum.

At the threshold the Court believes it should be noted that intellectual or philosophical patterns of political movements, governmental ideologies and revolutionary persuasions in foreign countries as well as any prejudice, bias or sympathy, and concepts resulting therefrom, have no place in this case which the Court has attempted to view through the colorless lenses of the controlling law as the Court believes it now exists.

After the application of the sifting process, the real controversy involved in this suit appears to exist between the Cuban government, its citizen, the plaintiff, Severiano Jorge, and its creature, Tabacalera Severiano Jorge, S.A., a corporation organized and existing under the laws of the Republic of Cuba, relative to the collection of indebtednesses due by the defending Florida corporations to the foreign corporation for the sale of tobacco in Cuba, as will appear from the matters hereinafter set forth.

The plaintiff, Tabacalera Severiano Jorge, S.A., hereinafter sometimes referred to as "Tabacalera," was and is a corporation organized and existing under the laws of the Republic of Cuba, with its principal place of business in Havana, Cuba, and was engaged in the business of selling leaf tobacco which was used in the manufacture of cigars.

The plaintiff, Severiano Jorge, was and is a citizen of the Republic of Cuba, who now resides in Miami, Florida where he fled after the overthrow of the Batista government in Cuba by the revolutionary government headed by Fidel Castro. Mr. Jorge alleges in his complaint filed herein that he is the sole stockholder of Tabacalera and that he possesses a general power of attorney executed on behalf of said corporation and authorizing him to act for and on behalf of said Cuban corporation.

The defendant, The Antonio Company, hereinafter sometimes referred to as "Antonio", was and is a corporation organized and existing under the laws of the State of Florida, with its principal place of business in the City of Tampa, Florida, and was and is engaged in the business of manufacturing cigars in said city.

The defendant, Standard Cigar Company, hereinafter sometimes referred to as "Standard", was and is a corporation organized and existing under the laws of the State of Florida, with its principal place of business in Tampa, Florida, and was and is engaged in the business of manufacturing cigars in said city.

The defendant, Republic of Cuba, is the revolutionary government of the Republic of Cuba, of which Fidel Castro is premier, and at all times material herein was and is the sovereign government of Cuba and so recognized by the government of the United States of America. Although the Republic of Cuba has been named as a defendant herein, there has not been any attempt to serve it with process in this suit.

This action primarily concerns matters which took place or were to take place in Cuba during 1960. It involves separate business transactions between Tabacalera and Antonio and between Tabacalera and Standard, the later seizure and intervention of Tabacalera by the Castro government for reasons of public interest, and subsequent attempts by those who managed and controlled Tabacalera before its seizure and intervention to recover in the name of said Cuban corporation or in the name of its alleged assignee, Mr. Jorge, sums claimed to be due Tabacalera by Antonio and Standard respectively, notwithstanding the seizure and intervention of the Cuban corporation by the Cuban government.

Between July 1, 1960, and July 25, 1960, Tabacalera sold and delivered in Havana, Cuba, to Antonio leaf tobacco of the value of $48,406.37, and to Standard leaf tobacco of the value of $100,894.28. In accordance with established custom and agreements between Tabacalera and Antonio and Standard, respectively, the purchase price of each shipment of tobacco was due and payable by purchaser thereof to Tabacalera, in Havana, 90 to 120 days after such shipment.

After the sale and purchase of the said tobacco, but before the purchase price of any of the shipments thereof became due and payable by either of the defendants to the plaintiff, on or about September 15, 1960, the Republic of Cuba, by Resolution No. 20260 of its Ministry of Labor, seized and intervened the entire Cuban tobacco industry, including leaf tobacco dealers and warehouses, cigar factories, and cigarette factories. Tabacalera was one of the many leaf tobacco dealers and warehouses seized and intervened.

The purpose of the seizure and intervention by the Cuban government of the Cuban tobacco industry was to increase production, to increase employment, to improve the quality of tobacco products, to guarantee the supply of tobacco to customary markets, to take over businesses which had been abandoned leaving numerous debts and many workers unemployed, and to normalize the situation in the tobacco industry, insuring the stability of workers and their jobs and the production of tobacco and tobacco products in general.

The tobacco industry was and is one of the great industries in Cuba. It was and is important to the economy of that nation and its people. The Court is of the opinion that the seizure and intervention of the Cuban tobacco industry by the Castro government, as recited at length in the said resolution affecting the intervention, was for reasons of public interest, welfare and concern and was an act of a sovereign or governmental nature (Jure Imeperii) and not an act of a business or commercial type (Jure Gestionis). Unlike the taking of property under subsequent resolutions which were admittedly retaliatory against acts of the Government of the United States, the intervention involved here was not unconnected with its subsequent use in being nationalized. Under those retaliatory resolutions, nationals of the United States were affected in a discriminatory manner and the takings thereunder cannot be justified on the basis on any conduct of the owners in their management of the property or its importance to the security of the Cuban nation, under the rules of international law.

The governmental acts of the revolutonary government of Cuba, which has been officially recognized as the sovereign government of that Republic by the

United States, are entitled to the same recognition and sanctity as the acts of any other foreign government so recognized by our country.

Pursuant to the provisions of the aforesaid resolution, one Armando Lobeto Alvarez was appointed interventor of Tabacalera and the other leaf tobacco dealers and warehouses. Continuously since his appointment, the said interventor has been in charge and control of Tabacalera and its assets, and has been managing its affairs. The stockholders, directors and officers of Tabacalera at the time of the said seizure and intervention were removed from charge and control of the plaintiff corporation and its assets and from the management of its affairs.

Notwithstanding the said seizure and intervention of Tabacalera by the Cuban government, the individual plaintiff, Severiano Jorge, and others who also had fled from Cuba to Miami, contacted Antonio and Standard separately and requested them to send the moneys which they owed to Tabacalera to it in his care at a Miami address.

After the intervention of Tabacalera, the interventor appointed by the Cuban government demanded that Antonio and Standard, respectively, pay to Tabacalera, in Havana, the sums claimed to be due for the tobacco which each had purchased. The interventor also notified each corporate defendant that no person or entity was authorized to collect in the United States in the name of Tabacalera the sums claimed to be due by each of said defendants to Tabacalera.

Despite the seizure and intervention of Tabacalera by the Cuban government, Mr. Jorge and perhaps other Cubans in Miami caused separate civil actions for damages to be filed in the name of Tabacalera against Antonio and Standard in the United States District Court for the Southern District of Florida, Tampa Division. The suit against Antonio was for damages in the sum of $48,406.37, and the suit against Standard was for damages in the sum of $100,894.28.

During the pendency of the federal court suits and prior to the institution of the case at bar, there was an alleged written assignment by Tabacalera to Mr. Jorge of all of its right, title, interest, claim and demand in and to the accounts receivable and all sums due thereunder owing by Antonio and Standard to Tabacalera.

While the federal court suits in the name of Tabacalera against Antonio and Standard were pending and being prosecuted, the case at bar was filed by Mr. Jorge individually and in the name of Tabacalera against Antonio, Standard and the Republic of Cuba.

In the federal court suit in the name of Tabacalera against Standard, on May 20, 1961, a final judgment was entered dismissing the suits on the ground of forum non conveniens. An appeal from the said judgment of dismissal has been taken in the name of Tabacalera to the United States Court of Appeals, Fifth Circuit, and such appeal is pending undisposed of.

The federal court suit in the name of Tabacalera against Antonio was dismissed voluntarily by the plaintiff therein.

The case at bar is a suit in equity by the plaintiffs for a declaratory decree setting forth the rights and obligations of the plaintiffs and defendants. The complaint alleges, among other things, that the seizure and intervention of Tabacalera was illegal and void and that Mr. Jorge is in doubt as to his legal rights as sole stockholder of Tabacalera and assignee of its claim against Antonio and Standard, and alleges upon information and belief that Antonio and Standard are in doubt as to the status of the plaintiffs and entertain genuine doubts as to whether a payment to the plaintiffs will absolve Antonio and Standard of future liability should it subsequently be determined that the intervention into the affairs of the corporate plaintiff was lawful, and that the Republic of Cuba has a right, through its interventor, to receive the sums of money due to Tabacalera.

The complaint further alleges that, in order to obtain jurisdiction over the Republic of Cuba, it is necessary that some res be in the possession of the court, and that it is essential therefore that the court order the sums of money owing by Antonio and Standard to Tabacalera to be deposited with the clerk of the court so as to form the basis for an order of publication directed to the Republic of Cuba.

The prayer of the complaint is that this Court find and determine the rights and obligations of the parties, that Antonio and Standard be ordered forthwith to pay to the clerk of this Court the sums of money which they are obligated to pay for the purchase of said tobacco, and that an order be entered herein requiring the Republic of Cuba and all parties claiming any interest in said sum of money to assert their claims upon a day to be fixed by this Court.

Antonio and Standard, separately, filed the several motions described in the first paragraph hereof. The respective motions to dismiss the complaint or to abstain from exercising jurisdiction in this cause were based, among others, on the grounds of forum non conveniens, that this Court should not sit in judgment on the acts of the government of the Republic of Cuba done within its own territory, failure of the complaint to state a cause of action against each corporate defendant, misjoinder of causes of action, misjoinder of parties defendant, and the failure of the complaint to state a cause of action for equitable and declaratory relief, or either.

This Court is of the opinion that the plaintiffs' complaint and this action should be dismissed because this Court should not sit in judgment on the acts of the Republic of Cuba, done within its own territory, and upon the ground of forum non conveniens.

All of the material transactions, occurrences and matters involved in this suit took place or were to take place in the Republic of Cuba.

The tobacco was sold and delivered in Cuba, and the purchase price therefor was to be paid in Cuba. The separate causes of action by Tabacalera against Antonio and Standard accrued in Cuba.

Tabacalera, a Cuban corporation, was seized and intervened in Cuba by the revolutionary government of the Republic of Cuba, which, through its interventor, took over the management and control of the corporation and its assets, including the claims of Tabacalera against Antonio and Standard.

The Castro government in Cuba is and continuously since January 7, 1959, has been recognized by the government of the United States of America. The government of the Republic of Cuba has all of the rights of sovereignty possessed by any and all foreign governments which are recognized by the government of the United States.

The acts of the Cuban government, in seizing and intervening the Cuban tobacco industry, including Tabacalera, were for reasons in the public interest, and were not for purely political, persecutory, discriminatory, racial or confiscatory motives.

It is well settled that the courts of one country will not sit in judgment on the acts of the government of another country within its own territory. Thus the acts of the Republic of Cuba in seizing and intervening the plaintiff corporation are not reviewable by this Court in this action.

The plaintiffs urge that this Court should exercise jurisdiction herein for the same reasons that the court exercised jurisdiction in the case of *Terry Kane, doing business as Agencio de Tractores y Equipos, S.A., v. National Institute of Agrarian Reform and Cuba Aeropostal Agency, Inc., and/or Cuba Aeropostal, S.A.*, Suit No. 61 L 730, in the Circuit Court of the Eleventh Judicial Circuit of Florida, in and for Dade County.

The *Kane* suit is distinguishable from the case at bar. The acts of the Republic of Cuba there involved and the parties to and the relief sought therein were dfferent from those herein. Further, the Republic of Cuba or its agency apparently was before the court and was defending that action.

In the *Kane* case, the plaintiff, Terry Kane, a United States citizen, sued an agency of the Cuban government for damages for the alleged wrongful expropriation of his business and property in Cuba by the government of the Republic of Cuba. Mr. Kane's property was expropriated pursuant to the provisions of Resolution No. 3 of October 1960 of the Cuban government, which provided for the nationalization through compulsory expropriation of the property of natural or juridical persons who were nationals of the United States of America or those who operated enterprises in which the nationals of this country had a predominant interest. The preamble of the last mentioned resolution discloses that the action of the Cuban government in expropriating the properties of nationals of the United States and others described therein was in retaliation for the embargo by the United States on general exports from the United States to Cuba. The nationalization of Mr. Kane's property was held not related to a public purpose involving the use of such property. The resolution was held discriminatory in that it applied only to the property of nationals of the United States or to property of those who operated enterprises in which nationals of the United States had a predominant interest. The expropriation of Mr. Kane's property was held not for reasons of public interest, but purely for political, persecutory, discriminatory and confiscatory motives in violation of international law.

Aside from the fact that this Court should not review the aforementioned acts of the Cuban government in seizing and intervening Tabacalera, there are other reasons why this Court should not entertain this suit.

The issues involved in this action are governed and controlled solely by laws, decrees, resolutions and proclamations of the Republic of Cuba which are unfamiliar to this Court.

The legality and effect of the seizure and intervention of Tabacalera, and the rights of the government interventor and of the former stockholders, directors, officers, attorneys-in-fact and agents of the Cuban corportion are involved, and are matters which this Court should not undertake to determine.

The Cuban interventor of Tabacalera and stockholders, directors, officers or attorneys-in-fact of the Cuban corporation at the time of seizure and intervention of the same and the assignee of the corporate plaintiff have made separate demands on Antonio and Standard, respectively, for the payment of the purchase price of the tobacco purchased by each of said corporate defendants.

This suit was instituted and is being maintained in the name of Tabacalera by stockholders, directors, officers, attorneys-in-fact or agents thereof prior to and at the time of the seizure and intervention of the corporation. The suit is not being maintained in the name of Tabacalera by the Cuban government or its interventor. This suit was instituted without the authority of the Cuban government or its interventor.

It has long been settled doctrine that a court sitting in one state will, as a general rule, decline to interfere with the management of the internal affairs of a corporation organized under the laws of another state but will leave controversies as to such matters

to the courts of the state of domicile of the corporation. This doctrine is even more important where the corporation is organized and existing under the laws of a foreign country. Thus this Court should not undertake to determine the controversy between the Republic of Cuba and Mr. Jorge or any other stockholders, directors, officers, attorneys-in-fact or agents of Tabacalera prior to or at the time of the seizure and intervention of the corporation by the Cuban government as to which has the right to manage the affairs of Tabacalera, a Cuban corporation, and to collect in the name of the said corporation any sums due to it by Antonio or Standard.

The Republic of Cuba is named a defendant in this action but no attempt has been made to serve it with process. Its acts in seizing Tabacalera were governmental in nature and were for reasons in the public interest. This Court is of the opinion that the Republic of Cuba cannot be sued in this action without its consent.

The Republic of Cuba is a necessary party to this action but is not before this Court and is not suable herein without its consent.

Any judgment entered herein would not be res judicata in Cuba or elsewhere in a suit by the Republic of Cuba against either Antonio or Standard for the purchase price of the tobacco purchased by each.

Tabacalera did not enter into its transactions with Antonio and Standard in Cuba in reliance upon this Court or any courts of the United States, and the plaintiffs cannot complain if this Court refuses to entertain this suit.

Neither the individual plaintiff, a national of Cuba, nor the corporate plaintiff, a Cuban corporation, has a constitutional right to sue in this Court.

The transactions, occurrences and matters involved herein are unrelated to this county, judicial circuit and state. This Court exists primarily for the benefit of the citizens of this county, circuit and state. The docket of this Court is crowded and to permit this suit to be prosecuted would burden this Court unnecessarily with difficult and complicated litigation.

As stated by authoritative courts in this country, it should be remembered that parties do not enter into civil relations in foreign jurisdictions in reliance upon our courts. They may not complain if our courts refuse to meddle with their affairs and remit them to the place that established and should enforce their rights.

If jurisdiction is exercised by this Court in this case, there is a likelihood that it will result in the filing in this Court of other suits involving Cuban citizens, laws, governmental actions or other matters unrelated to this forum and the citizens of Florida.

The primary obligation of this Court is to tend to local litigation expeditiously and efficiently and it should direct its energies first toward tending the crowded docket of litigation involving citizens of this county and the laws of this state and nation. The Court, in its opinion, should avoid burdensome and difficult cases involving the application of complicated foreign law which tends to congest the docket of this Court and which should best be determined by the Court of the foreign country where the case arose and should be brought. This Court is not obligated to try suits involving the laws of a foreign country, controversies existing between citizens of foreign countries and their government. Citizens of foreign countries such as Cuba should look to the law of their own country for relief. Comity does not require that this controversy be tried by this Court.

For the reasons hereinbefore stated, in the interest of justice this Court should dismiss the plaintiffs' complaint and this action on the ground of forum non conveniens.

It is apparent, from the many authorities consulted by the Court, that the plaintiffs herein do not have an absolute right to bring an action in this court. Whether the Court exercises jurisdiction in the case rests in the Court's sound discretion as directed by controlling authority.

This has not been an easy decision. The Court's struggle has been greatly lessened, however, by the real assistance afforded by counsel for the parties involved who have made a thorough review of the law bearing upon the various issues raised by the pleadings and have furnished the Court with exhaustive and authoritative briefs and pertinent argument. The many authorities relied upon by the Court for its findings, as related herein, have not been cited for reasons of brevity. Most, if not all, of said authorities are cited in the briefs furnished by counsel for the respective parties.

In view of this Court's decision to dismiss the plaintiffs' complaint and this action on the ground of forum non conveniens and also because this Court should not exercise jurisdiction to sit in judgment on the acts of the government of Cuba done within its borders, the Court conceives that it is unnecessary to rule upon the other grounds of the motions to dismiss which have been interposed or upon the other motions pending herein, some of which grounds and motions appear to the Court to contain merit.

It is, therefore, upon consideration,

ORDERED, ADJUDGED AND DECREED that the complaint of the plaintiffs, Severiano Jorge and Tabacalera Severiano Jorge, S.A., a Cuban corporation, and this action against the defendants, The Antonio Company, a Florida corporation, Standard Cigar Company, a Florida corporation, and the Republic of Cuba be and the same hereby are dismissed, but this dismissal is without prejudice to the rights of the plaintiffs to prosecute any claims they may have against the defendants, or either of them, in any other appropriate forum.

DONE AND ORDERED at Tampa, Florida, this 28th day of November, 1961.

/S/ JOHN G. HODGES,

Circuit Judge

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IN THE

SUPREME COURT OF THE UNITED STATES

1963

No. ~~840~~ 78

STANDARD CIGAR COMPANY, a Florida Corporation,
Petitioner,

vs.

TABACALERA SEVERIANO JORGE, S.A.,
a Cuban Corporation,
Respondent.

OBJECTION TO JURISDICTION AND REPLY TO PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 846

STANDARD CIGAR COMPANY, a Florida Corporation,
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vs.

TABACALERA SEVERIANO JORGE, S.A.,
a Cuban Corporation,
Respondent.

OBJECTION TO JURISDICTION AND REPLY TO PETITION FOR WRIT OF CERTIORARI

OBJECTION TO JURISDICTION

It cannot be fairly said that the decision sought to be reviewed upon certiorari is fairly within the provisions of 28 U.S.C.A. § 1254 (1) or Supreme Court Rule 19.

It affirmatively appears from the petition filed herein that the Court should not grant the petition for certiorari as the decision sought to be reviewed is not a final judgment. The petition shows that the District Court for the Southern District of Florida dismissed the complaint "without prejudice" upon motion. That order was predicated upon the doctrine of "forum non conveniens".

The Court of Appeals reversed the District Court, holding that the doctrine was not applicable to the case at bar because the forum of convenience contended for by the petitioner, namely Cuba, was not in fact a forum which was open to the respondent. In so doing the Court of Appeals said (Petitioner's Appendix B, page 7):

> "The residual questions of law in this case, not specifically dealt with in our opinion above, are more properly determinable by the District Court upon a full hearing on the merits.
>
> The cause is reversed and remanded with directions for further proceedings not inconsistent with our opinion in the Rodriguez case."

In *Chicago & Northwestern Rys. Co.* v. *Osborne,* 146 U.S. 354, this Court held that a writ of certiorari would not lie to review a judgment of the Court of Appeals reversing a judgment of the Circuit Court and remanding the cause for further proceedings for the reason that such a judgment was not final. This Court, in so holding, cited: *McLish* v. *Roff,* 141 U.S. 661; *Rice* v. *Sanger,* 144 U.S. 197; *Meagher* v. *Manufacturing Co.,* 145 U.S. 608.

REPLY TO PETITION FOR CERTIORARI

The petition for certiorari is directed to an opinion of the Court of Appeals for the Fifth Circuit which reversed a judgment of the District Court for the Southern District of Florida, dismissing without prejudice an action brought by the respondent to recover from the petitioner a debt which was admittedly due and owing.

The complaint sought to recover a sum from the petitioner in excess of $100,000.00 as a consequence of tobacco sold by the respondent to the petitioner and delivered by the respondent to the petitioner in Tampa, Florida.

The petitioner filed a motion to dismiss predicated in the main upon two grounds: (1) That the Court should not entertain the action because of the fact that the Castro government had appointed an interventor in Cuba to take over all of the assets of the respondent corporation, and that the Cuban government was not a party to the action and service could not be obtained upon it; (2) That the Court should apply the doctrine of forum non conveniens and upon that doctrine decline to take jurisdiction.

The District Court granted the motion to dismiss "without prejudice, however, to the right of the plaintiff to institute an action on its claim against the defendant in any other appropriate court". (R. 54)

In making and entering the above order the Court gave as its reason the following (R. 54):

> "D. The plaintiff's claim did not accrue within the jurisdiction of this Court.
>
> E. The docket of this court is crowded, and to permit this suit to be prosecuted would burden this court unnecessarily with difficult and complicated litigation.
>
> F. For the convenience of parties and witnesses and in the interest of justice, the plaintiff's claim best could be litigated and disposed of in the Republic of Cuba.
>
> G. For the reasons hereinbefore stated, among others, this action should be dismissed on the ground of forum non conveniens."

The Court of Appeals reversed the foregoing decision "for further proceedings." It is as to this decision that review is sought.

CLARIFICATION OF PETITIONER'S STATEMENT OF THE CASE

The petitioner's statement of the case needs clarification.

Petitioner says (Br. 3) that its motion to dismiss, the affidavit in support thereof and its answer "showed and show (certain) facts, issues and contentions to be involved in this suit." No effort is made to segregate these facts, issues and contentions in the following several pages of petitioner's brief, yet there is a vast difference between facts, issues and contentions. To mix the wheat and chaff in this fashion makes a reply difficult to state and tedious to consider.

For example, it is said that after the sale, purchase and shipment of the tobacco in July of 1960, but before the purchase price thereof became due and payable, respondent, the revolutionary government of Cuba, intervened and took control of the entire Cuban tobacco industry. The decree of intervention is dated September 15, 1960. (R. 25) The statement that this intervention decree was entered before the purchase price became due and payable is a conclusion of the petitioner, and a rather important one at that.

In its answer to the complaint, the petitioner says (R. 45) that in accordance with the customs, agreements and understandings between the plaintiff and the defendant, the purchase price of each shipment was due and payable in Havana, Cuba, ninety (90) days to one hundred and twenty (120) days after the shipment.

This statement does not set up a legal defense to the action. It could be inferred that the purchase price could

not be demanded prior to 90 days after the shipment was due until 120 days after shipment. In other words, the petitioner could take either 90 days to pay his bill or 120 days, as he saw fit. This, obviously, is no agreement; and in fact no agreement is alleged. The language is that the right to pay at this time depended upon a custom, an agreement, or an understanding. But which?

Likewise there is no contention before the Court as to what the purpose of the intervention was, as is set forth in the petition at page 6. There was never any admission at any time that any of the facts set forth in the intervention decree were true.

In the petition (page 6, sub-paragraph 5) it is stated that among the matters of fact or contentions in issue before the District Court, was the appointment of an interventor or manage the affairs of the respondent, who has been continuously in charge and control of the respondent, and that upon his appointment, the stockholders were removed as were the officers of the respondent. This statement appears in the affidavit of the President of the petitioner. (R. 10) This may or may not have been true when the affidavit was made, which was on the 29th of November, 1960. What is not mentioned, however, is the fact that the intervention order itself (R. 24) provides that it was resolved first to arrange "the intervention of those named above by reason of this resolution, for the period of one year." This period expired on September 15, 1961, which was long before the case was decided by the Court of Appeals. Therefore, it is not correct to imply to this Court that the interventor is still in charge and control of the respondent since the intervention decree has expired by its own terms long since.

It is also said that the Cuban nationals, meaning the stockholders, officers and directors of the respondent, knew that the interventor claimed the balance due to the corporation, but nevertheless they demanded payment of the sums due to the respondent in Miami.

The fact is that the attorney for the respondent wrote a letter to the petitioner in which the following statement is made:

> "Mr. Jorge is sure that you will not recognize the unlawful acts of the so-called interventor in attempting to assert title to claims incurred prior to the so-called intervention by the revolutionary government of Cuba. He therefore anticipates no trouble or delay in the matter of collecting the balance due on this account. As he has explained to you in his previous correspondence he holds an unconditional and unqualified power of attorney authorizing him to collect the money due to company. He has sought our opinion regarding his position in connection with the collection of monies due to Tabacalero Severiano Jorge, S. A. and it is our unqualified position that the actions of the so-called interventor were taken in defiance of law and that Mr. Alvarez (the interventor) has no right to demand or collect any money due to the corporation by reason of his forceable seizure of its properties in the Republic of Cuba."

QUESTIONS PRESENTED

I.

The Doctrine of Forum Non Conveniens Is Inapplicable Unless There Are at Least Two Forms in Which the Defendant Is Amenable to Process.

II.

The Allegations, Affidavits and Exhibits Contained in the Moving Papers Were Improperly Considered by the District Judge in Applying the Act of State Doctrine and, Therefore, Such Papers and Statements Should Not Be Considered Here.

III.

The Act of State Doctrine Does Not Require Recognition or Enforcement of Confiscatory Acts of a Foreign Sovereign with Respect to Local Assets Where Such Acts Are Repugnant to Local and International Law.

IV.

Sovereign Immunity Can Not Be Invoked Except on Suggestion of the Department of State or by Proof of a Governmental As Opposed to a Commercial Activity.

ARGUMENT

I.

The Doctrine of Forum Non Conveniens Is Inapplicable Unless There Are at Least Two Forms in Which the Defendant Is Amenable to Process.

The respondent's claim was predicated upon a transitory action arising out of a debt created as a consequence of the sale and delivery of tobacco to the petitioner in Tampa, Florida. The sale and delivery of the tobacco and the amount and liability of the debt sued for were admitted in the moving papers. (R. 13) Thus, there is no question as to venue or liability.

As for the suggestion that the forum was inconvenient, there was none which was more convenient than Tampa, Florida. The debtor had its principal place of business there, the goods were shipped to the petitioner in Tampa, and the real parties in interest were Cuban refugees who elected to sue the petitioner in the latter's home district. It is difficult to see now the petitioner can assert that it could be more convenient if the suit were maintained in Cuba than in the petitioner's home city. Actually, this is a transparent and mendacious claim. With the receipt of the goods and the amount of the debt being owing there was no occasion for any kind of trial.

The petitioner's claim that the courts of Cuba furnished a more convenient forum than the District Court in Tampa, belies not only human experience, but credibility.

The touchstone of the doctrine of forum non conveniens is that there are at least two forums in which the

defendant is amenable to process, and that a choice between them exists. *Gulf Oil Corp.* v. *Gilbert*, (1947) 330 U.S. 501.

The petitioner is not amenable to Cuban process. The moving papers do not so state and since this is a necessary condition precedent, it must be assumed that it did not exist. In any case this Court can and should take judicial notice of the fact that the Cuban courts are not open to the respondent.

In addition to want of legal merit, the Court should, as a matter of public policy, foster and encourage the collection of just obligations owed to Cuban refugees. It is currently estimated that there are over 150,000 of such Cuban refugees in Miami alone, the majority of whom are obtaining Federal relief in one form or another. Reduction of the burden upon U. S. taxpayers through permitting Cuban refugees to collect their just debts from American nationals is in and of itself sufficient reason to discredit the doctrine of forum non conveniens.

The reliance upon this doctrine is simply a smoke screen designed to delay, or possibly completely avoid, payment of a debt which is justly due and owing and as to which there is no doubt.

II.

The Allegations, Affidavits and Exhibits Contained in the Moving Papers Were Improperly Considered by the District Judge in Applying the Act of State Doctrine and, Therefore, Such Papers and Statements Should Not Be Considered Here.

The defense raising the Act of State Doctrine and the principle of sovereign immunity must be made by ap-

propriate pleadings and proof and not by a speaking motion. It is well established in Florida that a motion to dismiss is used merely to test the legal sufficiency of the complaint.

The claim that the issues in the case should not be considered because they involve matters as to which the Act of State Doctrine is applicable is plainly an affirmative defense. If so, it must be asserted in accordance with F.R.C.P. 8(c). As to this it is said in Barron & Holtzoff, Vol. 1A, Chapter 7, Paragraph 279, that:

> "Rule 8(c) is a simple and effective requirement that a party responding to any claim for relief shall affirmatively allege any matter constituting an avoidance of affirmative defense. The purpose of this is to prevent surprise. A general denial will not permit proof of such matters not affirmatively alleged. * * *"

The same author says, Paragraph 349, with respect to motions to dismiss that:

> "Matters of defense not appearing on the face of the complaint need not be considered on defendant's motion to dismiss, although some courts hold that the question of applicability of the statute of frauds and other affirmative defenses may be considered where the facts establishing the defense are not controverted. This is discussed in more detail in section 279 under Rule 8, ante and the cases there cited should also be considered with this section. Certainly a motion to dismiss cannot be substituted for trial on merits, and doubtful issues cannot be resolved on such a motion."

If it be contended here that the defenses were asserted in the defendant's answer, our reply to this is that the final judgment indicates otherwise. (R. 53)

The judgment recites that the cause came on to be heard upon the motion to dismiss or to abstain from ex-

ercising jurisdiction. There was no reference to the answer in the order. Also, the order stated that the action was dismissed "on the ground of forum non conveniens." There is no suggestion that the action was dismissed because of the Act of State Doctrine.

As to the suggestion that the Court should abstain from exercising jurisdiction, this was not based upon the Act of State Doctrine, but upon the ground that the liability of the parties was governed by the laws, resolutions, proclamations and decrees of the Republic of Cuba.[1]

III.

The Act of State Doctrine Does Not Require Recognition or Enforcement of Confiscatory Acts of a Foreign Sovereign with Respect to Local Assets Where Such Acts Are Repugnant to Local and International Law.

It is difficult to see upon what basis the petitioner, a Florida corporation, can assert this doctrine. The current Cuban government is not a party to the action, and if there was any immunity existing that immunity would be personal to the Cuban government which, of course, assuming that it was a recognized government, it could assert or waive.

In *P & E Shipping Corporation* v. *Banco Para El Comercio Exterior De Cuba*, (1962, C.C.A. 1) 307 F.2d 415,

1. It might be claimed that Paragraph 14 of the motion to dismiss (R. 7) asserts the Act of State Doctrine. This paragraph suggests that the controversy as to who has the right to collect the indebtedness due the plaintiff corporation, that is the Cuban government or the stockholders, is a matter between the Cuban government and its citizens which is governed solely by Cuban law and so forth. This is not the proper way to assert the Act of State Doctrine if it be such an assertion. Also the statement is a conclusion of the pleader.

in an action brought by a representative of the Cuban government, the Court said:

> "* * * On January 3, 1961, the President of the United States severed displomatic relations between the government of the United States and the government of the Republic of Cuba, and the government of the Swiss Confederation has assumed diplomatic and consular representation of the United States in Cuba. What is the status of the Republic of Cuba as a state and its right to sue in our courts during the period of cessation of diplomatic relations? If it is not permitted to sue, then it would seem that appellee should not have been permitted to bring the suit here in question, for it appears that appellee is an agent or instrumentality of the Cuban government. If the real party in interest is not permitted to sue, then suit on its behalf, whether disclosed or undisclosed on the record, should not be countenanced. * * *"

It is obvious from the facts at bar that if the Cuban interventor sought and was permitted to intervene, it would not interpose a plea of immunity, because it would be seeking affirmative relief against the petitioner. Since it would be seeking affirmative relief, it certainly would not plead the so-called Doctrine of State. The doctrine is a defensive one personal to the foreign government involved. On the other hand, it is obvious that the Cuban government under present existing relations, could only plead the doctrine in vain. For these reasons it is submitted that the petitioner has not even a legal standing to invoke the doctrine. It is but a red herring.

The following are the principal cases relied upon by the petitioner to support its contention that the decision sought to be reviewed is in conflict with the decisions of this Court and of other circuits with respect to the Act

of State Doctrine. The inapplicability of these cases, and the lack of conflict can be readily demonstrated.[2]

Underhill v. *Hernandez*, 168 U.S. 250, involved a claim for damages predicated upon refusal to grant to a United States citizen in Venezuela a passport to leave that country; for confinement to the plaintiff's residence in Venezuela, and for certain alleged assaults. It is also significant that the United States, when the action was brought, had recognized the revolutionary government which was being sued, in the United States, for alleged personal wrongs committed in Venezuela.

In *Ricaud* v. *American Metal*, (1917) 246 U.S. 304, this Court emphasized that the government whose earlier actions were under attack, had been formally recognized by the United States as the government of that country.

In *Aetjen* v. *Central Leather Co.*, (1917) 246 U.S. 297, the hides were seized by the Mexican government to satisfy an assessment. Here there was no physical seizure, only a constructive expropriation. This Court emphasized that the Mexican government had been recognized by the United States while the action was pending. Recognition by the United States was also involved in *United States* v. *Belmont*, (1937) 301 U.S. 324.

Pons v. *Republic of Cuba*, (1961) C.A.D.C., 294 F.2d 925, involved a suit by the Cuban government against one of its nationals who admittedly held money owed to the Cuban government and who had deposited the money owed in the registry of the Court. The only question was whether or not the Cuban citizen could maintain a counterclaim.

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2. We shall not attempt to discuss all cases cited by petitioner, but only those which petitioner apparently feels are of sufficient importance to warrant some discussion.

The petitioner here could likewise make such a deposit but it simply wants to avoid payment of its legitimate debt and retain use of the money. If the money were to be put in the registry of the Court it is extremely doubtful that the Castro government, in the present atmosphere, would even attempt to claim it.[3]

If such a deposit were to be made there would then be a tangible res in the jurisdiction, and jurisdiction of the Cuban government could be obtained by publication and thereby eliminate one of the straw objections advanced by the petitioner, viz. that if it paid the respondent it could conceivably still be liable to the Cuban government.

The petitioner next contends that the Court of Appeals erroneously predicated its decision upon *Banco Nacional de Cuba* v. *Sabbatino*, (C.C.A. 2) 307 F.2d 845. A reading of the opinion sought to be reviewed readily reveals that such was not the case. The only material difference between the two cases is that in the Sabbatino case the majority of stockholders of the Cuban corporation were American citizens. To hold that the Cuban refugees, who were the officers and stockholders of the respondent

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3. This Court, in *Compania Espanola de Navigacion Maritima, S.A.*, v. *The Navemar*, (1938) 303 U.S. 68, discusses and decides when a court should refuse jurisdiction solely upon the suggestion of a claim by a foreign power. The New York Court of Appeals discussed this decision in *Lamont et al.* v. *Travelers Ins. Co.*, 281 N.Y. 362, 24 N.E.2d 81, and predicated upon it, said: "* * * No issue is raised merely by suggestion of a government which refuses to intervene and to present proof to sustain its allegations; and immunity from suit exists only where the object of the suit is to enforce a claim or right against the foreign government or its property. The mere assertion by a foreign government, without proof, that property which is the subject of controversy between parties here belongs to the government, does not constrain the court to refuse jurisdiction of that property."

corporation, are in effect without remedy to collect a debt in the United States owed them by a United States citizen simply because Castro has issued an order is to ignore the realities of life and the current international situation, not to mention national tensions, which have developed as a consequence of the "Cuban Crisis". The United States has not only given these people refuge, it is supporting them through relief agencies at the expense of the people of this country. To adhere to the principles contended for by the petitioner that respondent has no right to sue in the United States courts simply because they are Cuban refugees, is not only contrary to the provisions of the Code (28 U.S.C.A. 1332) but unrealistic.[4]

It is also to be observed that the essence of the *Sabbatino* decision is the following:

> "Since the Cuban expropriation measure is a patent violation of international law, this court will not enforce it. It follows that C.A.B. owned the sugar which was sold in the present case."

The mere fact the respondents were Cuban nationals would not render the decision sought to be reviewed in conflict with that rendered by the Court of Appeals for the Second District in the *Sabbatino* case.

In addition to the foregoing, it is universally recognized that the Act of State Doctrine does not require recognition of decrees which are extra-territorial in effect or confiscatory and unilateral.

The doctrine that under principles of comity the Courts of this country will not question or examine the validity

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4. Realistically it should be observed that the decree of intervention does not in terms give to the Cuban interventor the right to sue for and collect the debts due and owing to a Cuban corporation.

of the acts or decrees of a foreign sovereign is established without limitation that such recognition is accorded only to those acts taken within the territorial jurisdiction of the sovereign. Vladikavkazsky Ry. Co. v. *New York Trust Co.*, (N.Y. 1934) 189 N.E. 456; *A/S Merilaid & Co.* v. *Chase National Bank*, 71 N.Y.S. 2d 377; *Compania Ron Racardi, S.A.* v. *Bank of Nova Scotia*, (S.D. N.Y. 1961), 193 F. Supp. 815; *Zwack & Co.* v. *Kraus Bros. & Co.*, (1956—C. C.A. 2) 237 F.2d 255.

The refusal to recognize confiscatory decrees with respect to assets located in this country, is, of course, predicated on the fact that such decrees are contrary to our public policy.

In *Schwartz* v. *Companie Azucarera, etc.*, 208 N.Y.S. 2d 833, the Court said:

> "* * * As to the question of title to the funds, it may well be that the Cuban Government acquired title to the same through nationalization. * * * In any event, our courts have held that nationalization decrees of foreign governments are repugnant to the public policy of the State of New York (Vladikavkazsky R. Co. v. New York Trust Co., 263 N.Y. App. Div. 601, 33 N.Y.S. 2d 986; Augstein v. Banska A Hutni Akciova Spolecnost, Sup. 124 N.Y.S. 2d 446, modified on other grounds 282 App. Div. 929, 125 N.Y.S. 2d 647). While the assets of the defendant may have been 'nationalized' the courts of this state deny any validity to effect such nationalization as to the assets within the State of New York (see Bollack v. Society Generale Pour, etc., supra)."

See also, *e. g., Stephens* v. *Zivnostenska Banka, National Corp.*, 213 N.Y.S. 2d 396; *In re Liebel's Estate*, 106 N.Y.S. 2d 715. *Harris & Company Advertising, Inc.*, v. *Republic of Cuba*, 126 So.2d 687 (Fla. App. 3rd Dist. 1961).

In *48 C.J.S.* (International Law), pp. 16-18, Par. 11, the text, in part, is as follows:

> " * * * Thus the acts of a foreign sovereign in expropriating property within its own territory are not reviewable by the courts of another sovereign, even though the act or agent or the property later comes within the jurisdiction of such courts. * * *"

In *Gonzales* v. *Industrial Bank (of Cuba)*, (1961) 227 N.Y.S. 2d 456, a Cuban refugee brought an action in New York to recover on a draft drawn by a Cuban bank upon a New York bank. The Cuban Bank intervened and a Czechoslovakian ambassador appeared and asserted a plea of sovereign immunity on behalf of Cuba and the Cuban bank. The lower Court held that the Cuban law which expropriated the Cuban bank was confiscatory in nature and ineffectual to deprive the refugee of her property. The Appellate Court, in denying the appellant's motion which had the effect of affirming the lower Court, said:

> "The State Department of the United States has not filed any suggestion that sovereign immunity be considered in this action. Its failure or refusal to suggest such immunity is accorded significant weight (National City Bank of New York v. Republic of China, 348 U.S. 356, 360, 75 S. Ct. 423, 99 L. Ed. 389).
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> The Court has decided that Law Decree 891 is confiscatory in nature, ineffectual to deprive plaintiff of her property, and is in violation of the public policies of the State of New York: * * *
>
> * * *
>
> No recognition will be given to such expropriation decrees as apply to assets located in New York (Bollack v. Societe Generale Pour Favoriser le Developpement du Commerce et du L'Industrie en France, 263 App. Div. 601, 33 N.Y.S. 2d 986; Plesch v. Banque

Nationale De La Republique D'Haiti, 273 App. Div. 224, 77 N.Y.S. 2d 43.

The United States Government does not have an overriding public policy requiring recognition of the lawless act of the Cuban regime which is clearly repugnant to our public policy. The decree is offensive and will not be given effect."

The above case is closely in point for the reason that the tobacco sold prior to the decree stands virtually in the same position as the draft issued prior to the decree, and was brought in both instances by refugees from the Castro government.

In *Terry Kane, etc.*, v. *National Institute of Agrarian Reform et al.*, No. 61-L-730, in the Circuit Court of Dade County, Florida, in an order denying the defendant's motion for summary judgment, the Court said:

"To grant defendant's Motion for Summary Judgment, recognizing the Act of State Doctrine, must of necessity, therefore, hold that a remedy exists through the courts or government of Cuba. The established courts of Cuba have been abolished and civil remedy is nonexistent according to undisputed affidavits in the file. The affidavit of Dr. Elio Rena Alvarez, a native and lifelong resident of Cuba until May, 1960, until which time he served as Judge in the highest tribunal of the Province of Havana, Cuba, being the equivalent of the Supreme Court of the United States is in part as follows:

'That there is in truth and fact no laws in open courts, no forums for judicial determination, no right of litigation or no constitutional guarantees presently existing on the island of Cuba;'

'That the Supreme Court of Cuba is now in exile and has publicly declared and unanimously endorsed that the present government of Cuba, as

such it may be called under the domination of Fidel Castro, is illegal and usurpius and without legal or legitimate authority.'

• • •

This recent Bank of Cuba case recites that the doctrine has its source in our conflict of laws principles and is thus a self imposed restraint. The learned District Court Judge D. J. Dimock then reasons that if one were to suppose a requirement of international law that a state afford full faith and credit to the acts of another state such requirement would not extend to an act of state which was in violation of international law; in other words it would violate the very legal basis for its existence. Judge Dimock's opinion then continues:

'The basis for such recognition and respect vanishes, however, when the act of a foreign state violates not what may be our provincial notions of policy but rather the standards imposed by international law. There is an end to the right of national sovereignty when the sovereign's acts impinge on international law. Judicial refusal to inquire into the validity of an act of a foreign state has also been due to a desire not to embarrass the executive in its conduct of foreign relations. See Bernstein v. Van Heyghen Freres S.A., 2 Cir., 163 F.2d 246, Cert. den. 332 U.S. 772. The United States State Department has, however, delivered a note to the Cuban Government declaring the very nationalization law which plaintiff seeks to enforce to be in violation of international law. It can scarcely be believed, therefore that judicial examination of the decree in the light of international law would embarrass the Executive.'

' • • • Courts of this country have the obligation to respect and enforce international law not only by virtue of this country's status and membership in the community of nations but also because

international law is a part of the law of the United States, see *The Pacquete Habana*, 175 U.S. 677, 700; *U. S. Cons. Art. 1*, ±8, cl. 10; *1 Oppenheim, International Law*, 41-2 (8th ed., *Lauterpacht*, 1955), supra.'"

IV.

Sovereign Immunity Can Not Be Invoked Except on Suggestion of the Department of State or by Proof of a Governmental As Opposed to a Commercial Activity.

There are only two ways in which sovereign immunity can be asserted. The first is by formal suggestion of the Department of State by the Attorney General, or in the absence of that, by proof that the acts of the sovereign involved were governmental as opposed to commercial in nature.

In *Banco Nacional De Cuba* v. *Steckel*, 134 So2d 23, 24 (3rd D.C.A. Fla. 1961), the Court held:

"The defendant's plea of sovereign immunity was not properly made. The procedure for raising a question of sovereign immunity is by making it a subject of diplomatic representation to the United States Department of State and the claim, if recognized, may be set forth and supported in an appropriate suggestion to the court by the Attorney General of the United States or an officer acting under his direction. See Harris & Company Advertising, Inc. v. Republic of Cuba, Fla. App. 1961, 127 So.2d 687; National City Bank of New York v. Republic of China, 348 U.S. 356, 75 S. Ct. 423, 99 L. Ed. 389; The Navemar, 303 U.S. 68, 58 S. Ct. 432, 82 L. Ed. 667; The Pesaro, 255 U.S. 216, 41 S. Ct. 308, 65 L. Ed. 592; Ex parte Muir, 254 U.S. 522, 41 S. Ct. 185, 65 L. Ed. 383; and United States v. Lee, 106 U.S. 196, 1 S. Ct. 240, 27 L. Ed. 171. The question of immunity was brought before the trial court by simple motion to dismiss filed on be-

half of the defendant, who made both a special and a general appearance. This was improper and the court's failure to recognize such a plea did not constitute reversible error."

See also: *State* v. *Dekle*, 137 So.2d 581, (Fla. App. 3d Dist. 1962); *Stephen* v. *Zivnostenska Banka, National Corp.*, 199 N.Y.S. 2d 707 (Supr. Ct. 1960).

In *Harris & Company Advertising, Inc.*, v. *Republic of Cuba*, 127 So.2d 687 (Fla. App. 3d Dist. 1961), the Court noted that the Department of State had made it clear that it would not intervene in cases where it felt the transactions of the sovereign were commercial as opposed to governmental, and that accordingly, it was incumbent upon the sovereign to prove its right to immunity notwithstanding the refusal of the Department of State to interpose a formal suggestion. In short, if the Department of State fails to intercede, the sovereign must *prove* that its challenged acts were governmental (*jure imperii*) as opposed to commercial (*jure gestionis*) in nature since only in the former case will it be entitled to claim immunity. Specifically, the Court held (127 So.2d at 692-693):

> "In this country, the Department of State, in the well-known Tate letter, made clear its position that it will not intervene in favor of sovereign immunity in cases where non-governmental functions are involved. This letter was approved in National City Bank of New York v. Republic of China, supra, which makes any claim for sovereign immunity in our courts *dependent on showing by evidence* that the case involves matters *jure imperii* and not *jure gestionis*.
>
> • • •
>
> In the present case, deposits in various banks have been attached, which, *until it is shown by preponderance of the evidence* that they are directly related to activities *jure imperii*, cannot be deemed immune from

the powers of the courts within the territories of which they are kept by the decision of the foreign government itself * * *." (Emphasis supplied).

The foregoing Florida decisions establish the substantive law and the public policy of the State of Florida with respect to the expropriation decrees of the Castro government. These decisions are in keeping with decisions of this Court, as well as the Courts of Appeal of the other Federal circuits.

CONCLUSION

The Court of Appeals has completely answered every question raised by the petition and brief. Its decision is legally sound and morally correct. The petition should be denied.

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I HEREBY CERTIFY that a true copy of the foregoing Objection to Jurisdiction and Reply to Petition for Writ of Certiorari was mailed to FOWLER, WHITE, GILLEN, HUMKEY & TRENAM, ESQS., Attorneys for Petitioner, 1002 Citizens Building, Tampa, Florida, this day of March, 1963.

THOMAS H. ANDERSON